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Supreme Court, U.S.
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No. 97-___

In The

Supreme Court of the United States

October Term, 1997

JEFFREY KENDALL,

Petitioner,

v.

BARBARA KENDALL,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Judicial Court Of The Commonwealth Of Massachusetts

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the requirement of independent appellate review of constitutional facts, set forth in *Bose v. Consumers Union of the United States*, 466 U.S. 485, 104 S.Ct. 1949 (1984), applies to cases that involve the exercise of First Amendment rights to freedom of religion under the United States Constitution.

2. Whether a lower court's judgment, requiring that the children of an interfaith marriage be raised as Orthodox Jews and be insulated from their father's Christian beliefs, violated the Establishment Clause of the United States Constitution by (a) establishing Judaism as the religion for children below the age of sufficient maturity to assert a personal religious identity and (b) excessively entangling government with religion.

3. Whether, by prohibiting virtually all shared religious observances by a father with his children instead of proscribing specific acts, the Massachusetts Supreme Judicial Court violated the First Amendment of the United States Constitution by (a) substantially burdening the father's free exercise of religion and (b) violating the father's right as a joint legal custodian to participate in guiding the religious upbringing of his children, in a manner not narrowly tailored to further a compelling state interest.

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PETITION FOR WRIT OF CERTIORARI

Jeffrey P. Kendall petitions for a writ of certiorari to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts.

OPINIONS BELOW

This petition seeks review of the opinion of the Massachusetts Supreme Judicial Court reported as *Kendall v. Kendall*, 426 Mass. 238, 687 N.E.2d 1228 (1997), which is reprinted in the Appendix to this petition at App. 1-20. The Findings of Fact and Conclusions of Law and the Order of the Norfolk County Division of the Probate and Family Court Department are unreported and are reprinted at App. 23-59.

JURISDICTION

The judgment of the Massachusetts Supreme Judicial Court was entered on December 9, 1997. The Massachusetts Supreme Judicial Court denied a timely petition for rehearing on January 27, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

> or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV, Section I provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Jeffrey P. Kendall and respondent Barbara Zeitler Kendall were married on April 24, 1988. They have three children: Ariel, Moriah, and Rebekah, ages 7, 5, and 3 at the time of trial. When Barbara and Jeffrey first married, Barbara was a Reform Jew and Jeffrey a nonpracticing Catholic. The parties testified that religion was not a major factor at the time of their marriage. Jeffrey and Barbara nonetheless informally agreed to raise their children in the Reform Jewish tradition. Later, they agreed to send the children to a private Jewish school in return for receiving financial support from Barbara's mother. Barbara testified that she and Jeffrey never discussed Orthodox Judaism. Jeffrey never agreed to preclude the children from all exposure to Christianity.

As time passed, Barbara and Jeffrey moved to the doctrinal extremes of their respective religions. Jeffrey was baptized in 1991 into the Boston Church of Christ, a fundamentalist Christian denomination. He began to take the children to church services, while continuing to raise them with Jewish influences as well. Three years later, Barbara underwent a ceremonial conversion to Orthodox Judaism. The differences between the parties escalated. In 1994, soon after her conversion, Barbara filed for divorce.

After the separation, Jeffrey – with Barbara's knowledge and acquiescence – continued to bring all three of the children to religious education classes at his church during each weekend that he had overnight visitation with them.[1] Then, in 1995, Barbara sought to bar Jeffrey from continuing to expose the children to his Christian faith. In response to her motion, the Norfolk County Division of the Probate and Family Court Department (the "Probate Court") restricted Jeffrey's visitation with the children to every other weekend from Saturday at sundown until Sunday at 6 p.m. This order allowed Barbara to spend the Jewish Sabbath (from sundown Friday to sundown Saturday) with the children every week, but denied Jeffrey the right regularly to share Sunday, the Christian holy day, with them. (Order on Defendant's Motion for Reconsideration, August 15, 1995.)

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[1] The Probate Court ordered that Barbara would have physical custody of the children, and that Jeffrey and Barbara would share legal custody. (App. 23.)

Jeffrey promptly complained that the Probate Court's ruling did "not take into account that the Defendant has equal rights to have the children exposed to his religious beliefs and that the Defendant is being denied access to the children because of the Plaintiff's religious beliefs." (Defendant's Motion to Modify Temporary Order, April 10, 1995.) In response to Jeffrey's Motion for Reconsideration, the Probate Court stated that "[t]he father has the right to expose the children to his religion by bringing them to church services." (Order on Defendant's Motion for Reconsideration, August 15, 1995.) The court thereafter allowed Jeffrey visitation with his children every other weekend from 5 p.m. Friday until 6 p.m. Sunday, but prohibited Jeffrey from instructing the children in Christianity or undermining the mother's indoctrination of the children in the Orthodox Jewish faith.[2]

The alleged incompatibility between Orthodox Judaism and Boston Church of Christ doctrine became the main focus of the divorce trial. The Probate Court appointed a guardian ad litem, Michael A. Goldberg, to "address the inter-religious conflict between the parties in particular." The guardian ad litem's report and recommendations

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[2] The Probate Court stated that "while this matter is pending, it would not be in the children's best interests for them to receive any instruction in another religion as it would be very confusing for them, especially in light of their ages. Unless and until a decision is made to alter in any way the religious upbringing, it is important to the children's well-being that the father not undermine, interfere with or otherwise contradict the religious teachings or customs provided by the mother's religion." (Order on Defendant's Motion for Reconsideration, April 15, 1995.)

were adopted virtually verbatim by the Probate Court[3] and became the foundation of that court's findings of fact.[4]

Based on the guardian ad litem's report, the Probate Court found that "at least the older two children (less so the youngest, given her age) were well-launched down a Jewish pathway, when their father chose to depart from that path." (App. 33.) The Probate Court acknowledged that the guardian ad litem reported "only a few instances of concrete present harm to the children"[5] and no "formal psychiatric diagnosis." (App. 48.) Nonetheless, the court quoted the highly speculative conclusion of the guardian ad litem that " 'should the children come to accept the religious beliefs that the father reports he wants them to

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[3] In the findings of fact, the Probate Court stated, "I rely heavily upon the G.A.L. in this matter." (App. 42.) The Probate Court also stated that "any appellate review of this matter should include a reading of the G.A.L. report in its entirety." (App. 42.)

[4] The opinion of the Supreme Judicial Court is set out at App. 1-20. The Findings of Fact and Conclusions of Law and Clarified Judgment of Divorce Nisi issued by the Probate Court are set out at App. 23-59. The Clarified Judgment was identical in all relevant respects to the original Judgment of Divorce Nisi.

[5] As examples of such "harm," the Probate Court discussed two incidents reported by the guardian ad litem, both of them involving the oldest child, Ariel. First, in early 1995, Jeffrey threatened to cut the fringes off Ariel's vest, or *tzitzit*, if Ariel did not tuck the fringes inside his pants. Jeffrey later apologized. Second, in the summer of 1995, Jeffrey cut off Ariel's religiously significant sideburns, or *payes*. Jeffrey testified that he did so at Ariel's request for a "whiffle" haircut, and that Ariel attached no religious significance to his father's cutting of his hair. The Probate Court rejected Jeffrey's explanation. (App. 35.)

accept, they are likely to come to view their mother negatively and as a person who will be punished for her sins . . . ,' resulting in a 'negative impact on their relationship with their mother . . . and difficulty accepting guidance and nurturance from her.' " (App. 46.)

The guardian ad litem, who was not a lawyer, recommended that the court impose restrictions on the religious content of Jeffrey's visitation, without discussing the constitutional implications of that recommendation. (Report of the Guardian Ad Litem, App. 136.) In the Clarified Judgment, the Probate Court adopted that recommendation, providing, in pertinent part, that:

> The [father] shall not take the children to his church (whether to church services or Sunday School or church educational programs); nor engage them in prayer or bible study if it promotes rejection rather than acceptance, of their mother or their own Jewish self-identity. The [father] shall not share his religious beliefs with the children if those beliefs cause the children significant emotional distress or worry about their mother or about themselves.

(App. 25-26.) The Probate Court also ordered that the court-appointed guardian ad litem explain to the children that "they are being raised in the way they are [*i.e.*, in the Jewish faith] because the Court believes it is in their best interest." (App. 27.)

In a subsequent order – which, though labeled a "Temporary Order," in fact was essential to the enforcement of the Clarified Judgment – the Probate Court further ordered that:

> To the extent that the defendant takes the children to the children's program (Sunday School) and his church (the Boston Church of Christ) or to any other religious program, service, or event (such as the Great Woods "concert" that was argued before me) he may not do so unless *the entire event is tape recorded, to permit review of the content* and specifically whether the content promotes rejection, rather than acceptance, of their mother or their own Jewish self-identity.

(App. 21) (emphasis supplied).

On appeal, the Massachusetts Supreme Judicial Court found it to be a "close question" "[w]hether the harm found [by the Probate Court] to exist amounts to the 'substantial harm' required to justify interference with the [father's] liberty interest." (App. 15.) The Supreme Judicial Court nonetheless deferred to the Probate Court's conjectural findings that the children *might* suffer harm as a result of exposure to their father's religious *beliefs*, noting that such factual findings were not "clearly erroneous." (App. 8.) Thus, the Massachusetts Supreme Judicial Court affirmed the Probate Court's restrictions on the petitioner's constitutional right to religious freedom[6] without exercising independent appellate review of the record.

Jeffrey Kendall believes that religious freedom is a precious liberty established and protected by the Constitution to the same extent as other First Amendment rights, and therefore that the Massachusetts Supreme

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[6] The Supreme Judicial Court declined Jeffrey's request that it review the Probate Court's Temporary Orders. (App. 2.)

Judicial Court should have subjected the Probate Court's ruling to the same independent appellate review applied to decisions abridging other Constitutional interests. He therefore respectfully seeks review by the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

I. APPELLATE COURTS MUST EXERCISE INDEPENDENT APPELLATE REVIEW OVER CONSTITUTIONAL FACTS IN CASES INVOLVING EXERCISE OF THE FIRST AMENDMENT RIGHT TO FREEDOM OF RELIGION.

A. The Massachusetts Supreme Judicial Court Overlooked and Misapprehended the Standard of Review Appropriate to This Action.

By applying the "clearly erroneous" standard to the Probate Court's findings of fact (App. 8), the Massachusetts Supreme Judicial Court failed to exercise its constitutional duty to apply independent appellate review over the critical constitutional facts in this action. The deferential standard applied by the Massachusetts court is inappropriate in a case, like this one, which involves First Amendment rights of freedom of speech, freedom of religion, and freedom of association. Because the Supreme Judicial Court failed to apply independent appellate review – and, indeed, paid extraordinary deference to questionable and sometimes unsupported "factual" findings of the Probate Court – further review by this Court is appropriate.

In cases implicating fundamental constitutional rights, this Court has repeatedly held that the "requirement of independent appellate review . . . is a rule of federal constitutional law." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 510-511, 104 S.Ct. 1949, 1965 (1984). *See also New York Times Co. v. Sullivan*, 376 U.S. 254, 284, 84 S.Ct. 710, 728-729 (1964). The Court has set forth two justifications for requiring an appellate court to make an "independent examination of the whole record . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *Sullivan*, 376 U.S. at 285, 84 S.Ct. at 729. First, the need for independent review arises from the difficulty of espousing constitutional principles in abstract terms. "It is only by the examination of individual cases that the principles can be applied and the lower court's understanding of those principles verified." *Bose*, 466 U.S. at 511, 104 S.Ct. at 1965. Second, thoroughgoing review by appellate judges is necessary "in order to preserve the precious liberties established and ordained by the Constitution." *Id.* "Particularly is this so where a decision here for review cannot escape broadly social judgments – judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship." 466 U.S. at 501 n.16, 104 S.Ct. at 1959 n.16.

Accordingly, this Court has extended the requirement of searching appellate review to a broad range of First Amendment cases, as well as to cases implicating other federal rights, such as: coerced confessions, *Arizona v. Fulminante*, 499 U.S. 279, 286-288, 111 S.Ct. 1246, 1252-1253 (1991); double jeopardy, *Turner v. Arkansas*, 407 U.S. 366, 368, 92 S.Ct. 2096, 2098 (1972); waiver of federal

rights, *Brookhart v. Janis*, 384 U.S. 1, 4 & n.4, 86 S.Ct. 1245, 1247 & n.4 (1966); probable cause determinations, *Ornelas v. United States*, 517 U.S. 690, 696-697, 116 S.Ct. 1657, 1662 (1996); Commerce Clause protections, *General Motors Corp. v. Washington*, 377 U.S. 436, 441-442, 84 S.Ct. 1564, 1568 (1964); and full faith and credit, *Adam v. Saenger*, 303 U.S. 59, 64, 58 S.Ct. 454, 457 (1938).

There is no obvious principle that would prevent the application of independent appellate review to cases implicating First Amendment rights to freedom of religion. Religious worship and discussion are "forms of speech and association protected by the First Amendment." *Wallace v. Jaffree*, 472 U.S. 38, 50 n.35, 105 S.Ct. 2479, 2486 n.35 (1985), *quoting Widmar v. Vincent*, 454 U.S. 263, 269, 102 S.Ct. 269 (1981). *See also Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877, 110 S.Ct. 1595, 1599 (1989) (noting that proselytizing is a protected act under the First Amendment). Moreover, this Court has cited approvingly the Third Circuit's application of constitutional fact review in a case involving both the free speech and establishment clauses of the First Amendment. *See Bender v. Williamsport Area School District*, 475 U.S. 534, 540 n.3, 106 S.Ct. 1326, 1330 n.3 (1986) (vacating the Third Circuit's holding on other grounds).

This case merits independent appellate review because the Supreme Judicial Court's review of the Probate Court judgment involved "a conclusion of law as to a Federal right and a finding of fact . . . so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *Hurley v. Irish-American*

Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 567, 115 S.Ct. 2338, 2344 (1995), *quoting Fiske v. Kansas*, 274 U.S. 380, 385-386, 47 S.Ct. 655, 656-57 (1927). As the Massachusetts Supreme Judicial Court acknowledged, "[T]his appeal brings questions of law, fact and discretion." (App. 71, n.10.) Specifically, the Probate Court's findings of harm were based almost exclusively on the guardian ad litem's assertion that the children may in the future suffer harm resulting from exposure to the teachings of Jeffrey's religion, and particularly from exposure to Jeffrey's belief that "people who do not believe in Jesus Christ will go to eternal punishment, described in the Bible as 'a place where there will be weeping and gnashing of teeth.' " (App. 35.) Whether such conjectural harm is sufficient to override the petitioner's Constitutional right to freedom of religion is exactly the type of mixed question of fact and law that mandates independent appellate review in order to ensure that lower courts not intrude upon protected First Amendment freedoms.

Where, as here, findings of fact and law are so blurred as to jeopardize First Amendment protections, a reviewing court cannot avoid its obligation to exercise its own thoroughgoing review of the factual record. As this Court noted in *Bose*, 466 U.S. at 501 n.17, 104 S.Ct. at 1969 n.17:

> At some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment. Where the line is drawn varies according to the nature of the substantive

> law at issue. Regarding certain factual questions in some areas of the law, the stakes – in terms of impact on future cases and future conduct – are too great to entrust them finally to the judgment of the trier of fact.

The importance of applying independent appellate review in a case such as this one was underscored by Judge Becker of the Third Circuit Court of Appeals in his dissenting opinion in *May v. Cooperman*, 780 F.2d 240, 260 (3d Cir. 1985). Judge Becker advocated in that dissent a position that the Third Circuit later adopted in *Bender v. Williamsport Area School District*, 741 F.2d 538, 542 n.3 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534, 106 S.Ct. 1326 (1986):

> Under *Bose*, plenary review is appropriate in a first amendment case whenever important "constitutional facts" are at issue, that is, whenever the district court's findings of fact presuppose a legal standard and have potentially grave effects on first amendment rights. The Supreme Court has recently stated this general principle: "Where, for example, as with proof of actual malice in First Amendment libel cases, the relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law." *Miller v. Fenton*, 474 U.S. 104, 114-116, 106 S.Ct. 445, 452 (1985).

780 F.2d at 260 (Becker, J., dissenting). The dissenting justice also rejected the argument that the strict *Bose*

standard should not be extended to establishment of religion cases:

> This position requires the implicit assumption that plenary review is more important when freedom of speech (or free exercise of religion) is at issue because an erroneous determination that speech (or religious exercise) is unprotected inhibits the expression of individuals' ideas and thus impairs personal freedom. To make explicit this assumption is to reveal its falsity, for one of the most fundamental of the Founding Fathers' tenets was that individuals must be free from governmentally imposed religion. The constitutional prohibition of established religion is surely as important as the guarantee of freedom of speech.

Id. at 260-61 (footnote omitted).

B. Application of the Independent Review Standard Compels this Court to Reverse the Massachusetts Court's Ruling.

In the case before this Court, the relevant legal standard – harm to children "so substantial as to warrant a limitation on the defendant's religious freedom" (App. 8) and "clear evidence of substantial harm" (App. 9) – "can be given meaning only through its application to the particular circumstances of a case." *Miller*, 474 U.S. at 114-116, 106 S.Ct. at 452. The Massachusetts Supreme Judicial Court, however, overlooked or misapprehended its duty to review the record *independently* of the Probate Court's findings, and to decide for itself whether sufficient evidence supported the "factual" findings at the core of the lower court's decision. Instead, the Supreme

Judicial Court merely repeated the Probate Court's findings without reviewing the sufficiency of the evidence supporting those findings. Had the reviewing court looked behind the Probate Court's findings, it would have found very little evidence to support key "facts." Indeed, substantial evidence overlooked by the Supreme Judicial Court undermined the pivotal findings of the guardian ad litem and the Probate Court.[7]

Using the deferential "clearly erroneous" standard, the Massachusetts Supreme Judicial Court noted that "[w]hether the harm found to exist amounts to the 'substantial harm' required to justify interference with [Jeffrey's] liberty interest is a close question. . . . " (App. 15.) Had the Massachusetts Supreme Judicial Court independently scrutinized the record, as petitioner urged the Supreme Judicial Court to do, and as that court was required to do under the "independent appellate review" standard set out in *Bose* and other precedents of this Court, it would not be a "close question"; the court would have been compelled to conclude there was insufficient evidence of substantial harm to the children to justify the substantial infringement of the father's First Amendment rights to freedom of speech, religion, and association.

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[7] *See* Petitioner's "Petition for Rehearing to the Massachusetts Supreme Judicial Court" (App. 70-72).

II. THE RULING OF THE MASSACHUSETTS SUPREME JUDICIAL COURT WAS ERRONEOUS.

Petitioner also seeks a writ of certiorari because the decision below is irreconcilable with the Constitutional protections set forth in the First Amendment.

A. The Ruling Below Violates the Establishment Clause of the First Amendment.

This Court has set forth a three-part test to determine whether challenged state action comports with the Establishment Clause: (1) it must have a secular purpose, (2) its primary effect must be one that neither advances nor inhibits religion, and (3) it must not foster excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613, 91 S.Ct. 2105, 2111-2112 (1971). The religious restrictions here at issue violate the *Lemon* test because they have the primary effect of advancing Judaism as the children's sole religion and because they entangle government with religion.

The goal of fostering the "best interests" of a child in a custody dispute is an acceptable, indeed compelling, secular purpose. Nonetheless, this purpose does not justify a child custody order impermissibly based on a court's opinion about the child-appropriateness of the content and tenets of one parent's religion. *See West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 1186 ("no official, high or petty, can prescribe what shall be orthodox in . . . religion"). *Cf. Palmore v. Sidoti*, 466 U.S. 429, 432, 104 S.Ct. 1879, 1881-82 (1984)

(reversing state court's child custody order that was impermissibly based on racial classifications).

The First Amendment prohibits all "governmental regulation of religious beliefs as such." *Smith*, 494 U.S. at 877, 110 S.Ct. at 1599 (citing cases). *See also City of Boerne v. Flores*, 521 U.S. ___, ___, 117 S.Ct. 2157, 2161 (1997) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds"). Nevertheless, the Probate Court, affirmed by the Massachusetts Supreme Judicial Court, focused almost exclusively on speculation as to the likely future effect of the petitioner's religious *beliefs*, rather than addressing the verifiable consequences of his *actions* (or, for that matter, tailoring an order narrowly to restrict certain actions without infringing his religious practice generally). For example, the Supreme Judicial Court accepted without question the Probate Court's "findings" that the petitioner's religion contains "frightening messages" about the fate of those who do not accept Jesus as their savior, and "leaves no room for tolerance of other religions." (App. 50.) Similarly, the Probate Court found – and the Massachusetts Supreme Judicial Court accepted, without independent review – that petitioner's three children *might* be harmed in the future by exposure to their father's belief "in Jesus Christ and that those who do not accept the Boston Church of Christ faith are 'damned to go to hell' where there will be 'weeping and gnashing of teeth.' " (App. 12, 35-36, 43-44.) The courts below arrived at that speculative finding of "harm" sufficient to override the father's First Amendment rights despite the fact that the belief ascribed to the petitioner derives from a

New Testament passage plainly describing Hell as a place where there will be "weeping and gnashing of teeth" (Matthew 8:12; 22:13; 25:30).

Such "findings" are constitutionally impermissible not merely because they evidence a bias against the father's religion in violation of the Establishment Clause. *Larson v. Valente*, 456 U.S. 228, 245, 102 S.Ct. 1673, 1683 (1982); *Barnette*, 319 U.S. at 642, 63 S.Ct. at 1187. More fundamentally, by evaluating the acceptability, or not, of the father's religious beliefs based on whether they coincide with the mother's (very different) religious beliefs, the Massachusetts Supreme Judicial Court violated the Constitution's prohibition on "punishing religious doctrines it believes to be false," objectionable, or insufficiently tolerant. *Smith*, 494 U.S. at 877, 110 S.Ct. at 1599, *citing United States v. Ballard*, 322 U.S. 78, 86-88, 64 S.Ct. 882, 886-887 (1944). *See also Lynch v. Donnelly*, 465 U.S. 668, 672, 104 S.Ct. 1355, 1358 (1983) (holding that the Constitution forbids hostility toward any religion).

The Massachusetts courts' rulings also violate the Establishment Clause by mandating that the children – initially raised in the Reform Jewish tradition and with exposure to Christian beliefs – must now be reared exclusively as Orthodox Jews with no exposure to the central tenets of their father's Christian faith. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson*, 456 U.S. at 244, 102 S.Ct. at 1683. The government may not adopt practices which " 'aid or oppose' any religion. . . . This prohibition is absolute." 456 U.S. at 246, 102 S.Ct. at 1684. By ordering that the children be raised in the Jewish faith, and by instructing a

government-appointed guardian ad litem to explain to the children that "they are being raised in the way they are [*i.e.*, in the Jewish faith] *because the Court believes it is in their best interest*" (App. 27-28) (emphasis supplied), the Massachusetts courts have chosen one religion, Orthodox Judaism, over another, fundamentalist Christianity. "[G]overnment inculcation of religious beliefs has the impermissible effect of advancing religion." *Agostini v. Felton*, ___ U.S. ___, ___, 117 S.Ct. 1997, 2010 (1997). "When the government favors a particular religion or sect, the disadvantage to all others is obvious." *Lee v. Weisman*, 505 U.S. 577, 608, 112 S.Ct. 2649, 2666 (1992) (Blackmun, J., concurring); *Engel v. Vitale*, 370 U.S. 421, 429, 82 S.Ct. 1261, 1266 (1962) ("Anguish, hardship and bitter strife" result "when zealous religious groups struggl[e] with one another to obtain the Government's stamp of approval").

By requiring taping, monitoring, and governmental second-guessing of the spiritual teachings of the father's church, the Probate Court and Massachusetts Supreme Judicial Court also excessively entangle government with religion. The ambiguous prohibitions contained in the Clarified Judgment cannot be enforced without continuous monitoring of the content of the Boston Church of Christ's religious services. As in *Lemon*, enforcement of the lower courts' order will require "comprehensive, discriminating, and continuing state surveillance" that constitutes "enduring entanglement" in violation of the First Amendment. 403 U.S. at 618, 91 S.Ct. at 2114. This offense to the principles of the Establishment Clause is magnified by the Temporary Orders, which conclude that tape-recording of all religious events to which the children are

exposed is necessary to enforce the judgment – and that unless the petitioner makes such tape recordings, he may *never* expose the children to his religion.

B. The Ruling Below Violates the Petitioner's Right to Free Exercise of Religion Under the First Amendment.

The Probate Court order affirmed by the Massachusetts Supreme Judicial Court also violates the Free Exercise Clause of the First Amendment by preventing the petitioner from sharing the basic tenets of his religious beliefs with his children. "The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." *McDaniel v. Paty*, 435 U.S. 618, 626, 98 S.Ct. 1322, 1328 (1978). Moreover, " . . . only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S.Ct. 1526, 1533 (1972).

The compelling state interest in fostering the best interests of the Kendall children does not justify the restrictions imposed on the petitioner, because there was no adequate showing of "substantial harm" to the children from exposure to their father's religious beliefs. Moreover, the restrictions were not narrowly tailored to intrude as little as possible on the petitioner's free exercise of religion. *See Wisconsin v. Yoder*, 406 U.S. at 233, 92 S.Ct. at 1542 (applying strict scrutiny when "the interests of parenthood are combined with a free exercise [of religion] claim").

The Probate Court order is not narrowly tailored. Throughout the pre-trial process, for example, Jeffrey

sought interfaith counseling with Barbara to enable them to better parent their children as an interfaith couple. Yet, the Probate Court entered its burdensome restrictions without first determining whether less intrusive family counseling would have helped the children maintain meaningful relationships with *both* parents while experiencing the religious differences as a source of strength instead of distress. Similarly, the Probate Court could have, but did not, limit its judgment to specific orders, for example, prohibiting the father from serving the children non-kosher food, from disparaging their mother, or from preventing Ariel's wearing of *payes* or *tzitzit*.

Instead, the Probate Court's order not only limits Jeffrey's ability to take his children to church (on the one weekend day on which he has visitation with them), but sweeps so broadly as to prohibit the father from even "shar[ing] his religious beliefs with the children if those *beliefs* cause the children significant emotional distress or worry about their mother or about themselves." (App. 26) (emphasis supplied). By prohibiting the father from exposing his children to any religious ideas which *may possibly* cause them distress, the Massachusetts courts have fashioned an order that, in effect, requires the father to censor his children's exposure to virtually all new or different religious ideas. This aspect of the ruling is particularly burdensome because trial testimony revealed that the petitioner's sincerely held religious beliefs require him to share his beliefs with others. (App. 34-36.) *See Smith*, 494 U.S. at 877, 110 S.Ct. at 1599 (noting that a state would be prohibiting the free exercise of religion if it sought to ban the performance of religious *acts*, such as proselytizing); *McDaniel v. Paty*, 435 U.S. at 626, 98 S.Ct.

at 1327 ("the right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions . . . ").

By requiring taping by the petitioner and monitoring by the court of certain church functions, the order affirmed by the Massachusetts Supreme Judicial Court further prevents the petitioner's free exercise of religion. Specifically, the order prohibits Jeffrey from taking his children to *any* religious event at his church unless he agrees to tape-record that event for later court review designed to ensure that the *content of the religious service* promotes "acceptance" of the mother and of the children's "Jewish self-identity." (App. 21.) If church officials do not allow the petitioner to tape-record their services for governmental review, the petitioner is effectively prevented from attending that service with his children and, thus, from exercising his religious freedom.

C. The Ruling Below Violates the Petitioner's Right to Participate in the Upbringing of His Children.

As father and joint legal custodian of his children, Jeffrey has a fundamental right to share in the direction of their religious upbringing. *See Wisconsin v. Yoder*, 406 U.S. at 233, 92 S.Ct. at 1542; *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625 (1923). Jeffrey's fundamental right to direct his children's upbringing, and his children's corollary right to their father's guidance, are irreparably infringed upon by the Massachusetts Supreme Judicial

Court ruling, which artificially constrains the parent-child relationship and denies Jeffrey any say in his children's religious life. The father, like the mother, should be permitted to share religious experiences with his children.

III. THIS CASE IS OF NATIONAL SIGNIFICANCE AND IMMEDIATE IMPORTANCE.

No liberties are more precious than the right to raise one's children and the right to religious freedom. "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. at 232, 92 S.Ct. at 1541-1542. The constitutional protections afforded these liberties, however, have come under tremendous pressure as the rate of interfaith marriage, and the frequency of divorce, have increased. Nationwide, the divorce rate has reached 50 percent – and the rate is even higher for interfaith marriages.[8]

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[8] More than 40 percent of Jews currently marry outside of their faith, compared with 6 percent during the 1950's. More than half of all Catholics marry outside of their faith, up from an estimated 20 percent in the 1950's. The divorce rate for Jewish-Christian couples has been estimated at nearly six times the rate for Jewish-Jewish couples and nearly twice the overall U.S. rate. JORDAN C. PAUL, *"You Get the House. I Get the Car. You Get the Kids. I Get Their Souls." The Impact of Spiritual Custody Awards on the Free Exercise Rights of Custodial Parents*, 138 U. PA. L. REV. 583, 583 nn.2-4 (1989).

Increasingly, lower courts will confront cases that implicate both freedom of religion and the right of divorced parents to participate in the upbringing of their children.

In light of this trend, the United States Supreme Court should take this opportunity to instruct appellate courts to exercise independent appellate review of constitutional facts in cases implicating the exercise of First Amendment rights to freedom of religion. It is crucial that this Court not allow child custody decisions to stand if they impinge impermissibly on the religious rights and liberties protected by the First Amendment.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue.

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Dated: April 27, 1998

SJC-07427

BARBARA ZEITLER KENDALL *vs.* JEFFREY P. KENDALL.

Norfolk. October 7, 1997. – December 9, 1997.

Present: Wilkins, C.J., Abrams, Lynch, Greaney, Marshall, & Ireland, JJ.

Religion. Constitutional Law, Freedom of religion, Establishment of religion. *Divorce and Separation,* Child custody, Division of property, Attorney's fees.

Complaint for divorce filed in the Norfolk Division of the Probate and Family Court Department on November 25, 1994.

The case was heard by *Christina L. Harms,* J., and posttrial motions were heard by her.

The Supreme Judicial Court granted an application for direct appellate review.

Michael S. Greco (*Robert A. Bertsche* and *Melissa J. Solomon* with him) for the defendant.

David E. Cherny (*Jacob M. Atwood* with him) for the plaintiff.

LYNCH, J. This appeal arises out of a judgment of divorce nisi issued on August 20, 1996.[1] Jeffrey P. Kendall, the defendant, appeals from provisions of the

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[1] On September 26, 1996, the Probate and Family Court judge issued a clarified judgment of divorce nisi, nunc pro tunc,

divorce judgment and a temporary order issued after Barbara Zeitler Kendall, the plaintiff, filed a complaint against him in the Probate Court for contempt of the divorce judgment.[2] The plaintiff also filed a cross appeal, requesting an award of attorney's fees and reversal of the joint custody order and disposition of the marital home. We granted the defendant's application for direct appellate review.

1. *Factual background.* We summarize the facts found by the judge. The parties professed to hold different religious beliefs when they were married in 1988, the

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to August 20, 1996. The clarified judgment effectuated minor changes to provisions of the initial judgment. These changes are unrelated to the issues raised in this appeal. Except for the minor revisions, the initial judgment and the clarified judgment are essentially the same.

[2] The judge issued the challenged temporary order on October 22, 1996 *"[i]n the interim"* and *"until the matter could be heard at trial"* (emphasis added). We reject the defendant's argument that the order is reviewable by this court. Despite the defendant's present position, he treated these orders as temporary when he appealed on November 27, 1996, pursuant to G. L. c. 231, § 118, first par. We note that, were we to conclude that the temporary orders were properly before us, we would scrutinize very carefully any order requiring an individual to audiotape religious services unless there was general acquiescence to the order's mandates. We would look more favorably on an order defining neutral solutions so as to minimize the court's involvement in sectarian issues. For instance, requiring a neutral observer to determine whether the content of religious services was violative of the court's judgment and to report any detrimental effect on the children would allow the court to maintain its focus on the legal issues rather than engage in an interpretation of the intricacies of the parties' respective beliefs.

plaintiff being Jewish, and the defendant, Catholic.[3] The parties' fundamental religious differences would be unremarkable but for their controversial effect on their three minor children[4] caught in the crossfire generated by their parents. Before the parties were married, they discussed the religious upbringing of any children, and agreed that children would be raised in the Jewish faith.[5]

In 1991, the defendant became a member of the Boston Church of Christ, a fundamentalist Christian faith. The defendant believes in Jesus Christ and that those who

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[3] We note the judge's determination that "[b]oth parents share this view: that Jews do not believe that Jesus [Christ] was the son of God, while Christians do believe that Jesus was the son of God." While noting the divergent beliefs, we do not imply that this seeming "[i]rreconcilability" inevitably signifies conflict and hostility. See *Zummo v. Zummo*, 394 Pa. Super. 30, 76 (1990) (refusing to weigh reconcilability of Christianity and Judaism).

[4] The children are Ariel (born October 10, 1988), Moriah (born May 19, 1991), and Rebekah (born April 21, 1993).

[5] The majority of courts adhere to the view that predivorce agreements are unconstitutionally unenforceable. See C.P. Kindregan & M.L. Inker, Family Law and Practice § 20.5, at 647 (2d ed. 1996) ("unimaginable that a court would specifically enforce a contract governing . . . the religious education of any children born of the marriage"); *Zummo v. Zummo, supra* at 58-67 (collecting cases). We note, however, that the judge found the children had primary familiarity with the Jewish faith. The judge concluded the children had a "Jewish identity" based on evidence that: the parties were married in a traditional Jewish wedding ceremony; Ariel was circumcised in accordance with Jewish tradition; both Moriah and Rebekah had traditional Jewish naming ceremonies; the parties agreed the children would attend a Jewish school; and all three children are so enrolled.

do not accept the Boston Church of Christ faith are "damned to go to hell" where there will be "weeping and gnashing of teeth." The defendant testified that he would like his children to accept Jesus Christ and that he "will never stop trying to save his children."

The parties' divergent views polarized in 1994 when the plaintiff adopted Orthodox Judaism.[6] Ariel also began studying and adhering to principles of Orthodox Judaism. Soon after the parties' beliefs drifted to opposite doctrinal extremes, the plaintiff filed for divorce in November, 1994, based on an irretrievable breakdown of the marriage, pursuant to G. L. c. 208, § 1B.

2. *The court proceedings.* At the outset the plaintiff sought to limit the children's exposure to the defendant's religion, and the defendant objected to any limitation on his ability to share his religious beliefs with the children.[7] On October 18, 1995, the judge granted the plaintiff's request for the appointment of a guardian ad litem (GAL)

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[6] Orthodox Judaism is considered the most strictly doctrinal of the three Jewish movements (Reform, Conservative, and Orthodox).

[7] After the plaintiff filed her complaint for divorce, a probate judge entered a temporary order according to a stipulation of the parties dated December 9, 1994. That "agreement" demonstrated that the parties considered their divergent religious views an issue throughout the divorce. The stipulation contained a provision stating, "Neither party shall make negative or derogatory comments to the children about the other parent or his/her religion." As soon as the order issued, both parties challenged the order's visitation schedule as interfering with planned weekend religious events with the children.

to "address the inter-religious conflict between the parties in particular."[8]

In *Felton v. Felton*, 383 Mass. 232, 233 (1981), this court addressed the question of accommodating diverse religious practices of parents, living apart, in the upbringing of minor children. The court held that the overriding goal in any such inquiry is to serve the best interests of the children even where "the attainment of that purpose . . . involve[s] some limitation of the liberties of one or other of the parents." *Id.* at 233.

The judge found it substantially damaging to the children to leave each parent free to expose the children, as he or she wishes, to his or her religion. The resulting judgment of divorce contained the following paragraphs:[9]

> "5. *RESTRICTIONS UPON RELIGIOUS EXPOSURE*: Each parent shall be entitled to share his/her religious beliefs with the children with restrictions as follows: neither may indoctrinate the children in a manner which substantially promotes their . . . alienation from either parent or their rejection of either parent. The [defendant] shall not take the children to his

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[8] The judge appointed Dr. Michael A. Goldberg as the guardian ad litem (GAL). The defendant initially expressed concern that the GAL would be biased because he perceived him as being Jewish. However, when the GAL indicated his willingness to withdraw, the defendant told him he wished to proceed and stated he was comfortable with his ability to conduct the investigation without bias.

[9] The judgment also ordered that the plaintiff retain sole physical custody of the children, and awarded the parties joint legal custody. The plaintiff's challenge to the award of joint custody is discussed in a subsequent section.

church (whether to church services or Sunday School or church educational programs); nor engage them in prayer or bible study if it promotes rejection rather than acceptance, of their mother or their own Jewish self-identity. The [defendant] shall not share his religious beliefs with the children if those beliefs cause the children significant emotional distress or worry about their mother or about themselves. Thus, for example, [the defendant] may have pictures of Jesus Christ hanging on the walls of his residence, and that will not serve as any basis for restricting his visitation with his children. But, [the defendant] may not take the children to religious services where they receive the message that adults or children who do not accept Jesus Christ as their lord and savior are destined to burn in hell. By way of further example, [the defendant] may not shave off [Ariel's] payes. This provision shall not be construed so as to prevent [the defendant] from having the children with him at events involving family traditions at Christmas and Easter.

"In the event that there is a disagreement between the parents as to whether one or more of the children could be exposed to the religious belief(s) of [the defendant] with*out* substantial negative impact upon their emotional health, the parents shall engage the services of Michael Goldberg, Ph.D., to act as G.A.L./investigator/evaluator on such issues and disputes. The fee of Dr. Goldberg shall be shared equally by the parties. In the event that Dr. Goldberg is unable to serve in this capacity, then the parties shall agree upon an alternate child psychologist, or an alternate shall be selected by the Court. . . .

> "6. *EXPLANATION TO CHILDREN.* Neither party shall initially discuss with the children the terms and conditions of this Judgment. Within two (2) days of the date of receipt of this Judgment, the Plaintiff shall contact the Court-appointed Guardian Ad Litem, Dr. Michael Goldberg, to arrange for a meeting with the children. Dr. Goldberg shall explain to the children, in a developmentally appropriate manner, the Court's decision, with the goal being to help the children understand that they are being raised in the way they are because the Court believes that it is in their best interest. It is intended by the Court that this intervention may help the children avoid blaming themselves."

The defendant argues in this appeal that the judge's findings did not demonstrate "substantial harm" to the children so as to warrant the limitations imposed on his liberty interest in educating his children in the tenets of his religion. He challenges both the judge's factual findings of harm and the legal conclusions based on that evidence.[10]

3. *Standard of review.* We scrutinize without deference the legal standard which the judge applied to the facts to ensure the ultimate findings and conclusions are consistent with the law. *Williams v. Resolution GGF Oy*, 417 Mass. 377, 382 (1994), citing *Marlow v. New Bedford*, 369 Mass. 501, 508 (1976). The plaintiff was required to demonstrate "in detail" that exposure to the defendant's religion caused the children "substantial injury, physical or

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[10] As in *Felton v. Felton*, 383 Mass. 232, 239 (1981), this appeal brings questions of law, fact, and discretion.

emotional, and [would] have a like harmful tendency for the future." *Felton v. Felton, supra* at 234, 235. We uphold the judge's factual findings unless they are clearly erroneous[11]; we review her legal conclusions to ensure they are based on correct legal standards. *Williams v. Resolution GGF Oy, supra* at 382 n.6.

4. *Analysis.* "[P]arents together have freedom of religious expression and practice which enters into their liberty to manage the familial relationships." *Felton v. Felton, supra* at 233, citing *Wisconsin v. Yoder,* 406 U.S. 205 (1972). Those individual liberties may be restricted where there is a compelling interest. *Felton v. Felton, supra.* A parent's right to practice religion may be restricted only where limited exposure to that parent's beliefs is necessary to further a child's best interests. *Felton v. Felton, supra.* To do so, there must be an affirmative showing of harm caused by exposure to the conflicting religious teachings. *Id.* at 233-234.

The determinative issue is whether the harm found to exist in this case to be so substantial so as to warrant a limitation on the defendant's religious freedom. In *Felton v. Felton,* this court suggested that a "likely source[ ]" of

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[11] We reject the defendant's argument that the judge improperly relied on Dr. Steven Hassan's testimony regarding cults, mind control, and the Boston Church of Christ. The defendant contends Dr. Hassan was not a qualified expert and his testimony was highly prejudicial. Even assuming the testimony was inadmissible, the judge specifically stated that she did not rely on Dr. Hassan's testimony in making her ruling; therefore, there can be no prejudicial effect. See *Berlandi v. Commonwealth,* 314 Mass. 424, 452 (1943); *Commonwealth v. Darby,* 37 Mass. App. Ct. 650, 655 (1994).

proof of substantial harm "by implication" could be derived from testimony as to the child's general demeanor, attitude, school work, appetite, health or outlook. *Id.* at 242, citing *Pope v. Pope*, 267 S.W.2d 340, 343 (Mo. Ct. App. 1954). The court also opined that the "wholly uncorroborated testimony" of a parent was insufficient to demonstrate harm. *Felton v. Felton, supra.* By implication, the court suggested that a plaintiff should consult "church, school, medical or psychiatric authorities" to support a charge that a child has been harmed by exposure to the parent's religious beliefs. *Id.* Moreover, the court specifically recommended the appointment of "a qualified investigator (whether called a guardian or some other title) who would look into the facts, render a report, and be subject to examination by the parties." *Id.*

Other States have struggled to define what constitutes substantial harm.[12] Very few have actually

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[12] See *Khalsa v. Khalsa*, 107 N.M. 31, 36 (Ct. App. 1988) (general testimony regarding parents' divergent religious beliefs causing child to be upset or confused insufficient to justify restriction of exposure to noncustodial parent's religion); *Munoz v. Munoz*, 79 Wash. 2d 810, 815 (1971) (duality of religious beliefs does not per se create conflict in child's mind); *Robertson v. Robertson*, 19 Wash. App. 425, 427 (1978) (child's alarm at religious beliefs insufficient); *Zummo v. Zummo*, 394 Pa. Super. 30, 74-76 & n.39 (1990) (rejecting speculation by parents and experts as to potential future emotional harm to child based on assumption that exposure is generally harmful); *In re Marriage of Weiss*, 42 Cal. App. 4th 106, 116-117 (1996) (rejected notion that contradictory messages caused harm, no evidence child had disciplinary problems, nor bruises); *In re Marriage of Mentry*, 142 Cal. App. 3d 260, 266 (1983) (held that evidence of child's social adjustment problems in school and periodic stomach aches were not attributable to conflict over religion); *Kirchner v. Caughey*,

ruled that substantial harm had been demonstrated.[13] [14]

We adhere to the line of cases requiring clear evidence of substantial harm.[15] See note 12, *supra*. Application of the strict requirements in those cases comports

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326 Md. 567, 577, 579 (1992) (child psychiatrist determined that child suffered from anxiety was not conclusive where problems could just as easily have been attributed to parental conflicts); *Levitsky v. Levitsky*, 231 Md. 388, 398 (1963) (requiring serious danger to life, or health of child before determining protection necessary from exposure to parent's religious beliefs).

[13] In *Morris v. Morris*, 271 Pa. Super. 19, 35 (1979), the court prohibited the child's father, a Jehovah's Witness, from bringing the child, a baptized Catholic, with him on door-to-door proselytetic endeavors. *Kirchner v. Caughey*, *supra* at 581, similarly cautioned against prohibiting parents' ability to share their religious beliefs with their children unless the beliefs involved proselytizing. See *Prince v. Massachusetts*, 321 U.S. 158 (1944) (limiting guardian's ability to expose minor child to religious proselytizing). In *Ledoux v. Ledoux*, 234 Neb. 479, 486 (1990), the court upheld a prohibition of a child's exposure to the noncustodial parent's religion where a child psychologist found the child suffered from "serious" stress evidenced by bed wetting. In *Ledoux*, however, the Nebraska court followed its precedent that the custodial parent usually determines the child's religious upbringing. *Id.*

[14] One State court seemed to recognize the broad range of available case law, stating, "As the threat to the child diminishes, the balancing of interests becomes more difficult." *Kirchner v. Caughey*, *supra* at 576.

[15] The case of *Morris v. Morris*, *supra*, cautioned against an *overly* strict requirement of substantial harm. In *Morris*, *supra* at 34, the court noted that, in a given case, the court should not have to wait until a showing of present psychological harm "progress[es] to a mentally crippling point before action could be taken."

with the protections of religious freedoms historically preserved under the Massachusetts Constitution. See *Society of Jesus of New England v. Boston Landmarks Comm'n*, 409 Mass. 38 (1990), *S.C.*, 411 Mass. 754 (1992) (citing authorities documenting historical protection of religious freedoms).

The harm found to exist in this case presents more than the generalized fears criticized in *Felton v. Felton*, *supra*. The judge afforded substantial weight to the GAL's report.[16] The judge considered the report so "comprehensive" that it should be considered in its entirety on any appellate review.[17] Among the factors the judge cited to support her conclusion that substantial harm to the children had been demonstrated are the following findings:

> "20. I find that, in early 1995, the [defendant] threatened to cut the fringe off Ariel's tzitzitz if he did not tuck it inside his pants. This greatly upset Ariel and the [plaintiff], and the [defendant] later apologized.
>
> "21. I also find that, in the summer of 1995, the [defendant] cut off Ariel's payes. I do

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[16] The GAL's report was based on interviews with the parents, the children, and the children's teachers, psychological tests, and observations of the children interacting with both parents.

[17] We reject the defendant's argument that the judge erred in refusing to allow him to review the GAL's file notes. The defendant was not denied an opportunity to rebut the GAL's report or cross-examine the GAL. See *Gilmore v. Gilmore*, 369 Mass. 598, 605 (1976) (finding error where judge refused to allow GAL to testify at trial). The defendant had a copy of the GAL's report and took advantage of his opportunity to cross-examine the GAL at trial. There was no error.

not find credible the [defendant's] explanation that he did so at Ariel's request.

" . . .

"24. I find that the Boston Church of Christ services to which [the defendant] has taken his children have included teachings that those who do not accept the Boston Church of Christ faith are damned to go to hell where there will be 'weeping and gnashing of teeth.'

"25. I find that the oldest child, Ari, has drawn from the above teaching the conclusion that [the plaintiff] may go to hell, and that this causes him substantial worry and upset.

" . . .

"56. [The defendant's] behavior toward his children fosters negative and distorted images of the Jewish culture. [The defendant] insists that all individuals who do not accept his beliefs about life and existence are sinners who are destined to tortuous punishment. [The defendant] opposes his children being taught the history of the Holocaust. Further, [the defendant's] cutting off of Ari's religiously meaningful side burns (payes), and his threats to cut off his clothing fringes (tzitzitz) show that he does not refrain from inducing guilt in the child for having the beliefs that he does.

"57. I find that Ari has a strong Jewish self-identity. I am persuaded by the report of the G.A.L. that Ari 'clearly identified himself and his siblings as being Jewish and provided a rationale based on Jewish law for his belief that he is Jewish,' and that the child's 'behavior in which he ascribes his Jewish identity to Jewish law and theology is indicative of his attainment

of a formal self-identification of himself as a Jew.' Indeed, [the defendant] himself reluctantly concedes that if asked, Ari would unquestionably say he is Jewish.

"58. [The defendant] understands that Ari perceives himself as Jewish, and that having a Jewish identity is akin to having an ethnic identity. But the matter goes further. Ari perceives his Jewishness as being part of his 'soul.' For Ari, efforts to convince him that his religion is wrong are logically equated with convincing him that his 'soul' is damaged or inadequate. . . .

"59. I credit the G.A.L.'s report and testimony that Ari 'may experience choosing a religion as choosing between his parents, a task that is likely to cause him significant emotional distress.' In fact, the G.A.L. specifically concludes, and I credit his conclusion, that the children are now in a position where they are perilously close to being forced to choose between their parents, and to reject one.

"60. I find, based upon the G.A.L.'s report as well as his testimony, that the oldest child Ari ' . . . is emotionally distressed by the conflict between his strong desire for affection and approval from [the defendant] and his desire to maintain his Jewish religious practice,' and that as a direct result ' . . . there has been a decline in his motivation and academic performance.'

" . . .

"62. I find that Ari is understandably uncomfortable and unhappy when he 'has to do the stuff [he's] not supposed to do on Shabbas', and that precisely as the G.A.L. indicates, Ari then has the no-win dilemma of pleasing and obeying [the defendant] (while displeasing and

disobeying [the plaintiff] and his own internalized beliefs about how the world is 'supposed' to function on the Sabbath) or the reverse. Poor Ari: he told [the defendant] that he 'wants to celebrate the Sabbath and not do stuff that I'm not supposed to do', and [the defendant's] response was 'we'll discuss that with the lawyers.'

" . . .

"64. I credit the G.A.L.'s report that 'Moriah is experiencing emotional distress related to the parental conflict . . . ' I find that Moriah has a very solid understanding of who she is and who her family is: 'I'm not Christian. I'm Jewish. Mom is Jewish. My dad is Christian. My brother is Jewish and my sister is Jewish.' Moriah's straightforward description is comfortable and age-appropriate. More importantly, it is accurate. And most important of all, it shows that she can tolerate the knowledge of her parents' religious differences.

" . . .

"66. I find, based upon the G.A.L.'s report that Rebekah is likely to experience ' . . . a sense of not belonging in her own home' by ' . . . anything that serves to promote her identity as fundamentally different from that of her mother and siblings.' I find this would be substantially to her detriment.

"67. I credit the report of the G.A.L. that 'should the children come to accept the religious beliefs that [the defendant] reports he wants them to accept, they are likely to come to view their mother negatively and as a person who will be punished for her sins . . . ' resulting in a

> ' . . . negative impact on their relationship with their mother . . . and difficulty accepting guidance and nurturance from her.' I find this would be to the children's substantial detriment.
>
> "68. For children of tender years (and it seems to me that this likely means at least up to age 12), I find directly contradictory messages from trusted adults to be solidly contrary to their best interests."

Whether the harm found to exist amounts to the "substantial harm" required to justify interference with the defendant's liberty interest is a close question, especially because there is considerable value in "frequent and continuing contact" between the child and both parents, and "contact with the parents' separate religious preferences." *Felton v. Felton, supra* at 234. In this regard the judge ruled:

> "There is surface appeal to the [defendant's] argument that the [plaintiff] has not met her burden of establishing substantial present harm to the children from exposure to [the defendant's] religious beliefs and practices, for the G.A.L. found only a few instances of concrete present harm to the children. I am mindful that the G.A.L. has not found current damage to the children so severe that it has caused them to suffer a psychotic break, or to have a 'formal psychiatric diagnosis'. . . . The case law does not require the court to wait for formal psychiatric breakdown and the evidence paints a strong picture of the reasonably projected course if the children continue to be caught in the cross-fire of their parents' religious difference: [the defendant's] religion may alienate the children from their custodial parent (she is bad, she will burn

> in hell), and may diminish their own sense of self-worth and self-identity (Jews are bad, Jews will burn in hell). At minimum they will be called upon to 'choose' between their parents, in itself a detrimental result. The G.A.L. predicts damaging consequences of the children's exposure to two vastly different, and on some points directly contradictory religious views. 'Sometimes . . . a diversity of religious experience is itself a sound stimulant for a child . . . the question that comes to the courts is whether, in particular circumstances, such exposures are disturbing a child to its substantial injury, physical or emotional, and will have a like harmful tendency for the future.' (*Felton*, [*supra*] at 234-235). Applying that standard to the facts of this particular case, I see substantial evidence of current and imminent harm, to these 7, 5, and 3-year-old children."

In balancing these conflicting interests, fully aware of the complexities and nuances involved, we conclude that the judge's findings support her order in paragraph 5 of the judgment.

Where, as here, the judge has found demonstrable evidence of substantial harm to the children, we reject the defendant's arguments that the divorce judgment burdens his right to practice religion under the free exercise clauses of the Massachusetts and United States Constitution.[18] Both the Massachusetts and the United States Constitutions permit limitations on individual liberties where

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[18] We note that the defendant has raised a constitutional claim under the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-1 et seq. (1994). Even if properly raised, this claim cannot succeed where the Supreme Court declared the

there exists a compelling interest. See *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972) (deferring to parental rights with respect to religious upbringing of children absent harm to their physical or mental health); *Prince v. Massachusetts*, 321 U.S. 158, 166-167 (1944) (recognizing parents' rights to practice religion and rights to family decision-making are not beyond limitation); *Felton v. Felton, supra*, at 233 (stating limitations on individual liberties permissible where best interests of child must be promoted); *Custody of a Minor*, 375 Mass. 733, 748 (1978) (emphasizing that parental rights "do not clothe parents with life and death authority over their children"). Promoting the best interests of the children is an interest sufficiently compelling to impose a burden on the defendant's right to practice religion and his parental right to determine the religious upbringing of his children. *Felton, supra* at 233. Paragraph 5 of the divorce judgment is limited in scope and imposes a minimal burden on the defendant's right to practice religion by requiring only that he limit sharing certain aspects of his beliefs with his children. The divorce judgment imposes no additional limitations on the defendant's individual ability to practice his religion. Thus, we believe paragraph 5 of the divorce judgment is a constitutional limitation on the defendant's individual liberties as it is necessary to ensure the best interests of the children.

The defendant's claim that the divorce judgment violates art. 11 of the Amendments to the Massachusetts Constitution and the establishment clause of the First Amendment to the United States Constitution must also

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Religious Freedom Restoration Act unconstitutional in *Boerne v. Flores*, 117 S. Ct. 2157 (1997).

be rejected. In making establishment clause assessments in the past we have applied the test set out by the United States Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). *Attorney Gen. v. Bailey*, 386 Mass. 367, 378, cert. denied sub nom. *Bailey v. Bellotti*, 459 U.S. 970 (1982). In so doing we determine whether the divorce judgment has a secular purpose, that neither advances nor inhibits religion, and does not "foster 'an excessive government entanglement with religion.' " *Attorney Gen. v. Bailey, supra*, quoting *Lemon v. Kurtzman, supra* at 612-613. Although there is considerable doubt about the continued vitality of the test in *Lemon v. Kurtzman, supra*, in light of recent decisions of the Supreme Court,[19] we reach this conclusion if we apply that more stringent test.

We reject the defendant's claim that the divorce judgment "established Judaism" as the religion to govern his children's upbringing. In limiting the children's exposure to the defendant's religion, the judge merely recognized the preference that the parties allowed to develop and one that the defendant, until recently, encouraged. Moreover, paragraph 5 was intended for a wholly secular purpose – to limit the emotional harm to the children caused by exposure to negative messages presented by the defendant's religion.[20] Although the judgment

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[19] See The Supreme Court, 1996 Term, Fallon, Foreword: Implementing the Constitution, 111 Harv. L. Rev. 56, 85 (1997); The Supreme Court, 1994 Term, Fried, Foreword: Revolutions?, 109 Harv. L. Rev. 13, 68 (1995).

[20] For similar reasons, we reject the defendant's argument that paragraph 6 of the divorce judgment, which requires the guardian ad litem to explain the court's judgment to the children, is an unconstitutional establishment of religion.

contemplates continued court involvement, it does not foster excessive government entanglement because the focus of any judicial inquiry will center on the emotional or physical harm to the children rather than the merit worthiness of the parties' respective religious teachings.

5. *Joint custody.* The plaintiff argues on cross appeal that it was an abuse of discretion to award joint legal custody to the parties. The determination of custody rests within the discretion of the judge. *Vilakazi v. Maxie,* 371 Mass. 406, 409 (1976). The material facts found and reported must support the judge's action in awarding joint legal custody to the parties. *Id.* We are mindful of the importance of a trial judge's opportunity to observe and appraise both parents in custody matters. *Stevens v. Stevens,* 337 Mass. 625, 627 (1958). The plaintiff argues that joint legal custody is inappropriate because she and the defendant are unable to agree on "major decisions regarding the [children's] . . . moral and religious development." G. L. c. 208, § 31. See *Rolde v. Rolde,* 12 Mass. App. Ct. 398, 404-405 (1981) (suggesting joint custody is appropriate where parents are "relatively stable" and "amicable" and agree on basic issues). Because the plaintiff points to no conflict other than the parties' inability to reconcile their views as to the children's religious upbringing, we conclude that she has not established that the judge abused her discretion in granting joint custody.[21]

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[21] The judge heard considerable testimony over the course of a five-day trial and apparently did not consider the parties unable to cooperate on other child care issues.

6. *Property disposition and attorney's fees.* The plaintiff also argues the judge erred in granting the defendant twenty-five per cent of the proceeds on the sale of the jointly owned marital home because her family provided the funds for its purchase. We will not set aside the trial judge's division of marital assets unless an award is "plainly wrong and excessive." *Heins v. Ledis,* 422 Mass. 477, 481 (1996). The judge found that the purchase of the marital home was a completed gift to the parties from the plaintiff's parents. The award was well within the proper exercise of her discretion.

The plaintiff also claims that she should have been awarded attorney's fees pursuant to G. L. c. 208, § 38, because the defendant proceeded in a dilatory and vexatious manner. The judge's decision not to award attorney's fees is within her discretion. *Brash v. Brash,* 407 Mass. 101, 106 (1990). Furthermore, she was in a position to observe first hand the defendant's conduct; therefore, we shall not disturb her assessment on the basis of a printed record.

Judgment affirmed.

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT PROBATE AND
FAMILY COURT DEPARTMENT

NORFOLK, ss. Docket No. 94 D 1947 D1

Barbara Kendall v. Jeffrey Kendall	TEMPORARY ORDERS (on Complaint for Contempt dated September 26, 1996)

(1) The plaintiff's Complaint for Contempt came on for hearing before me today. The defendant wishes to exercise his right to trial on the Complaint, and to that end today's hearing and arguments before me shall constitute a PreTrial, and an "Order Following Pretrial" is issued separately today.

(2) In the interim (until the matter can be heard at trial), since the activity which the plaintiff claims is contemptuous is the father's taking the children to various religious programs, services, or the like, the defendant has voluntarily offered not to take the children to any "adult" church service at his church (the Boston Church of Christ) – and it is so ordered. To the extent that the defendant takes the children to the children's program (Sunday School) at his church (the Boston Church of Christ) or to any other religious program, service, or event (such as the Great Woods "concert" that was argued before me) he may not do so unless the entire event is tape recorded, to permit review of the content and specifically whether the content "promotes rejection, rather than acceptance, of their mother or their own Jewish self-identity".

(3) Further, to assist the court in determining whether the content of the children's program at the Boston Church of Christ, or any other religious program to which the defendant takes the children (such as the "Great Woods" concert) "cause[s] the children significant emotional distress or worry about their mother or about themselves", or causes "substantial negative impact upon their emotional health", it is ORDERED that the GAL, Michael Goldberg, PhD. shall forthwith interview the children (outside the presence of either parent) and file a short written report with the court, copy to counsel for each parent. Payment for Dr. Goldberg's services shall be in accordance with the Divorce Judgment Nisi of this court.

All until the further order of the court.

10/22/96
date

/s/ Christina L. Harms
Christina L. Harms
Justice

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY COURT

NORFOLK DIVISION DOCKET NO. 94D1947-D1

Barbara Z. Kendall, Plaintiff

v.

Jeffrey P. Kendall, Defendant

CLARIFIED JUDGMENT OF DIVORCE NISI
(Clarifications appear in underlined text)

All persons having been notified in accordance with law and after hearing it is adjudged nisi that a divorce from the bond of matrimony be granted the said plaintiff for the cause of an irretrievable breakdown of the marriage as provided by Chapter 208 Section 1-B and after the expiration of ninety days from the entry of this judgment it shall become and be absolute unless, upon the application of any person within such period, the Court shall otherwise order, and it is further ordered that:

1. *CUSTODY*: The parties shall have joint legal custody of the three minor children, Ariel Kendall (DOB: 10/10/88), Moriah Kendall (DOB: 5/19/91), and Rebekah Kendall (DOB: 4/21/93). The mother shall have physical custody of the children.

2. *CHILD SUPPORT*: The father is Ordered to pay $50.00 per week in child support while unemployed. If the father becomes gainfully employed at Boston Financial Data Services at $400.00 per week, as expected, then he shall pay $125.00 per week in child support.

All child support payments called for hereunder shall be made by wage assignment once the father obtains employment. The father upon obtaining employment shall immediately notify the mother so that said wage assignment may be implemented.

Beginning with the calendar year 1996, the father shall be entitled to claim the children as his dependency exemptions for tax purposes. The mother shall not claim the children as dependency exemptions in contravention of the terms of this paragraph, and she shall execute a Form 8332 (Release of Claim to Exemption for Child of Divorce or Separated Parents), releasing her right to claim the children as dependents, promptly each year. In the event that the mother obtains employment or has income that would allow her to utilize the dependency exemptions for one or more of the children, then she shall notify the father in writing of her request to claim one or more child(ren) as dependency exemptions, and the father shall not unreasonably withhold his consent.

3. *CHILD SUPPORT UPON EMANCIPATION*: Child support shall be paid until each child is emancipated as defined below, the amount being reduced by 1/3 as each child is emancipated. Emancipated shall be defined as the earliest occurrence of the following events:

a. Death of a child;

b. Attaining the age of eighteen if the child is independent of parental support and no longer residing in the home, provided that neither part-time employment while pursuing an education as a full-time student nor full-time employment during school vacations nor living on campus or in approved

off-campus housing while attending college or private secondary school on a full-time basis shall be deemed emancipation;

c. Attaining the age of twenty-one years, except if the child is enrolled in a formal full-time college undergraduate education, the child shall not be deemed to be emancipated until s/he graduates from college or abandons the education program or no longer resides with either party or reaches the age of twenty-three years, whichever first occurs.

4. *VISITATION*: The father shall be given visitation with the three minor children on alternating weekends (those weekends where Saturday falls on ODD numbers) from Saturday at 12:00 noon to Monday morning, when he shall drop the children off at school or day care; and on every Wednesday from 4:30 p.m. to 7:30 p.m. The father shall also have the children for up to four weeks during the summer with at least two consecutive weeks, and one vacation week during the school year. The father must give the mother at least 90 days advance written notice of his selection of the weeks during the summer and the vacation week during the school year.

5. *RESTRICTIONS UPON RELIGIOUS EXPOSURE*: Each parent shall be entitled to share his/her religious beliefs with the children with restrictions as follows: neither may indoctrinate the children in a manner which substantially promotes their rejection of their Jewish ethnic and religious identity, or promotes their alienation from either parent or their rejection of either parent. The father shall not take the children to his church (whether to church services or Sunday School or

church educational programs); nor engage them in prayer or bible study if it promotes rejection, rather than acceptance, of their mother or their own Jewish self-identity. The father shall not share his religious beliefs with the children if those beliefs cause the children significant emotional distress or worry about their mother or about themselves. Thus, for example, father may have pictures of Jesus Christ hanging on the walls of his residence, and that will not serve as any basis for restricting his visitation with his children. But, father may not take the children to religious services where they receive the message that adults or children who do not accept Jesus Christ as their lord and savior are destined to burn in hell. By way of further example, father may not shave off Ari's payes. This provision shall not be construed so as to prevent father from having the children with him at events involving family traditions at Christmas and Easter.

In the event that there is disagreement between the parents as to whether one or more of the children could be exposed to the religious belief(s) of their father without substantial negative impact upon their emotional health, the parents shall engage the services of Michael Goldberg, Ph.D., to act as G.A.L./investigator/evaluator on such issues and disputes. The fee of Dr. Goldberg shall be shared equally by the parties. In the event that Dr. Goldberg is unable to serve in this capacity, then the parties shall agree upon an alternate child psychologist, or an alternate shall be selected by the Court.

The Wife shall have the children on Rosh Hashana, Yom Kippur, Succoth, Hoshana Rabah, Shmini Azereth, Simchat Torah, Hanukah, Purim, Passover, Sh'vous, and Tisha B'Av. (For purposes of the preceding sentence, each

listed holiday shall be considered to be one day and the wife must notify the husband in writing specifying the one day, at least 90 days in advance of the day.) The Husband shall have the children on Christmas Eve, Christmas, and Easter. The parties shall alternate having the children on Thanksgiving, Martin Luther King Day, President's Day, Memorial Day, Labor Day, and Independence Day as follows: the Husband shall have Thanksgiving, Independence Day, and Labor Day in the even numbered years and Martin Luther King Day, President's Day, and Labor Day in the odd numbered years. (For purposes of the preceding sentence, each listed holiday shall mean the actual day on which the holiday falls, not the entire holiday weekend.)

Notwithstanding the above schedule, the children shall be with the father on Father's Day, and with the mother on Mother's Day, even if that day occurs on a Sunday that the children would otherwise be with the other parent.

6. *EXPLANATION TO CHILDREN*: Neither party shall initially discuss with the children the terms and conditions of this Judgment. Within two (2) days of the date of receipt of this Judgment, the Plaintiff shall contact the Court-appointed Guardian Ad Litem, Dr. Michael Goldberg, to arrange for a meeting with the children. Dr. Goldberg shall explain to the children, in a developmentally appropriate manner, the Court's decision, with the goal being to help the children understand that they are being raised in the way they are because the Court believes that it is in their best interest. It is intended by the Court that this intervention may help the children avoid blaming themselves.

7. *LEGAL FEES*: Each party shall be responsible for his or her own legal fees.

8. *HEALTH INSURANCE*: Upon the availability of medical insurance through his employment, the Defendant shall maintain and pay for such insurance for the benefit of the minor children, and for the benefit of the Plaintiff. If there is an additional cost to maintain the Plaintiff on said insurance over and above the cost of a family plan, the Plaintiff shall be given the option to pay any such additional cost to maintain said insurance. Each party shall be responsible for his or her own uninsured medical and dental expenses. As to uninsured medical and dental expenses for the children, the Plaintiff shall pay the first ONE HUNDRED ($100.00) DOLLARS per calendar year, per child, of any uninsured medical, counselling, or dental expense. Any balance shall be shared equally (50/50) by the parties.

9. *DIVISION OF ASSETS*: The Defendant shall retain as his sole and exclusive property the following:

a. all bank accounts standing in his individual name;

b. all personal property, furnishings, office equipment, and tools in his possession;

c. a 1982 Mercedes automobile; and

d. his IRA account.

The Plaintiff shall retain as her sole and exclusive property the following:

a. all bank accounts standing in her name;

b. all personal property and furnishings in her possession, except for the stereo, camping

equipment, teak desk, and power and carpentry tools, which are hereby granted to the Husband;

c. her automobile;

d. the two joint CST Growth Fund accounts;

e. her IRA account; and

f. her interest in the 63 Maverick Square condominium.

The Plaintiff and the Defendant jointly own the house and property located at 19 Country Lane, Sharon, Norfolk County, Massachusetts. The Plaintiff shall assume all costs and expenses related to the 19 Country Lane property.

Sale of the marital residence shall occur upon the youngest child's graduation from high school, and the net proceeds shall be divided as follows: Wife shall receive 75%, and the Husband shall receive 25%. In the event the Wife purchases the Husband's interest in the marital home, the then fair market value shall be determined by an independent appraisal of the property unless otherwise agreed between the parties.

10. The Plaintiff shall be allowed to resume her former name of BARBARA ZEITLER.

September 26, 1996
Date

/s/ Christina L. Harms
Christina L. Harms,
Justice

Nunc pro tunc: 8/20/96

COMMONWEALTH OF MASSACHUSETTS TRIAL COURT PROBATE AND FAMILY COURT DEPARTMENT

NORFOLK, ss. Docket No. 94D-1947-D1

Barbara Zeitler KENDALL v. Jeffrey P. KENDALL	FINDINGS OF FACT and CONCLUSIONS OF LAW

I. PROCEDURAL HISTORY:

1. Barbara Kendall (hereinafter referred to as the "wife") commenced this action by filing a Complaint for Divorce from Jeffrey Kendall (hereinafter referred to as the "husband") on November 22, 1994 in the Norfolk County Division of the Probate and Family Court.

2. On October 12, 1995, the court appointed a child psychologist, Michael Goldberg, Ph.D., as Guardian Ad Litem ("G.A.L.") to provide the court with clinical information regarding the impact of various custody and visitation arrangements upon the children. The G.A.L.'s 31-page Report came into evidence at trial, and the G.A.L. also testified.

3. Trial of this matter occurred over the course of five days (March 11, 12, 13, 27 and 28, 1996) before Judge Christina Harms.

II. M.G.L. ch. 208, section 34 FACTORS:

LENGTH OF MARRIAGE:

4. The parties were married in 1988, separated in 1994 and divorced in 1996. Thus this is a marriage that lasted as a practical matter for six (6) years and as a legal matter for eight (8) years. This marriage produced three (3) children: Ariel (D.O.B. 10/10/88) (age seven at time of trial), Moriah (D.O.B. 5/19/91) (age five at time of trial), and Rebekah (D.O.B. 4/21/93) (almost age three at time of trial).

CONDUCT OF THE PARTIES:

5. On evidence given by both parties, I find that this was a marriage which began satisfactorily, but deteriorated thereafter. There are several factors which led to the demise of the marriage.

6. One factor is the husband's financial immaturity. He did not secure or maintain stable employment during the marriage. I credit as fully accurate his own self-criticism: "in hindsight, I have not been very responsible as a financial provider for my family."

7. Another factor is the wife's equal financial immaturity. She was very dependent upon her parents for financial support prior to her marriage and, following the marriage, both she and her spouse became complacent in their dependency upon the very generous financial support of the wife's parents. During the marriage, the wife's mother gave the parties $20,000 each year, as a gift,

toward their support. In addition, the wife's father provided the wife with credit cards such as Discover, MasterCard/Visa, and Mobil, which were used by the wife to purchase clothing, gasoline, food, etc., and which were paid by the wife's father. During the marriage, the wife's mother gave the parties $200,000 to purchase a home. During the marriage, the wife's mother paid for the children to attend private (Jewish) schools. The financial support provided by the wife's parents meant that the parties did not have to seek or maintain stable employment to support themselves and three children, and they consistently relied upon the wife's parents for cash support.

8. A third factor leading to the demise of this marriage is the drift by each spouse towards the extreme of his/her religion of origin (hers being Jewish, his being Christian). The parties had different religious beliefs when they met, the wife being Jewish and the husband Catholic. While the wife did not observe the Jewish Sabbath on a regular basis, she lived in the Hillel House while a student at Tufts University and observed the Jewish high holidays. The husband did not attend religious services prior to marriage. Although the parties agreed to maintain a Jewish home and to raise their children with a Jewish identity, it is clear that there was a mutual failure to appreciate the potential pitfalls they might (and did) encounter. This was worsened by the unforeseen development, after they married, of each migrating to the extreme end of the spectrum of Judaism and Christianity, respectively.

A. Religious Conduct:

9. I find that, prior to marriage, the parties had extensive conversations regarding the issue of religion and I find, based upon both the wife's and the husband's testimony, that they had a specific agreement that their children would be raised with a Jewish identity and that theirs would be a Jewish home.

10. For eight months prior to their marriage, the parties sought premarital counseling, as an interfaith couple, with Rabbi Summit at the Tufts Hillel House, and with Rabbi Kaminsky, who performed their wedding ceremony.

11. The parties were married by Rabbi Kaminsky in a traditional Jewish ceremony under a chuppah. Parts of the wedding ceremony were spoken in Hebrew, the husband wore a yarmulke, and he broke the glass.

12. The parties' first child, a son, Ariel, was circumcised by a moyal in a bris, following which there was a Jewish pidyon haben ceremony in New Jersey with the wife's family. In addition, following the births of each of their two daughters, Moriah and Rebekah, the parties had a traditional Jewish naming ceremony.

13. I fully credit the wife's testimony that the parties deliberately selected Hebrew names for their children. Furthermore, I find that the parties agreed that their children would attend private Jewish school and the children have in fact (all three) done so, with the financial support of the maternal grandmother. This support was conditioned upon the children attending private Jewish school.

14. Sabbath celebration became a weekly ritual for the entire family. Between 1992 and 1994, the couple completed the traditional Jewish Sabbath rituals of saying Hebrew prayers for wine, bread, and light on most Friday evenings. The children were typically present for these rituals. Because father had a better ear for music, he typically led the reciting of Jewish prayers. Mother purchased challah (traditional Jewish bread) nearly every week. Father knows the Hebrew prayers for the wine, bread and light and sang them regularly with his family at Friday night dinners between 1992 and 1994.

15. Since the birth of the first child, each summer mother and child(ren) have attended a "Jewish family camp" for a week. Father had joined the family at the Jewish family camp on several occasions.

16. I find that before be married the wife, the husband agreed to embrace some aspects of the Jewish religion, and he agreed to raise their children Jewish. However, he began to abandon his agreement in 1991, as set forth more fully below.

17. The husband began to study the Bible with members of the Boston Church of Christ in October of 1990, and became a member of the Boston Church of Christ in June of 1991.

18. I credit the husband's testimony that he now lives his life according to the Bible, that the Boston Church of Christ teaches him and he must help others to find Jesus Christ, that he believes that only those who accept Jesus are saved from "gnashing of teeth and burning in hell," that he would like his children to accept

Jesus Christ, and that he will never stop trying to save his children.

19. The wife began to embrace orthodox Judaism in 1994. She has kept Kosher for the past year and a half, she celebrates the Sabbath each week, and when she travels during the Sabbath she does so by foot. In accordance with orthodox Judaism, Ariel studies with Rabbi Nathan Schaffer each week and wears tzitzitz (a fringed garment worn under his shirt) and payes (sideburns, or in the case of a child, long hair in front of the ears).

20. I find that, in early 1995, the husband threatened to cut the fringe off Ariel's tzitzitz if he did not tuck it inside his pants. This greatly upset Ariel and the wife, and the husband later apologized.

21. I also find that, in the summer of 1995, the husband cut off Ariel's payes. I do not find credible the husband's explanation that he did so at Ariel's request.

22. I find that the husband has been distressed that the children have been taught about the Holocaust in school.

23. I fully credit the husband, other Boston Church of Christ members, and the G.A.L., all of whom agree that the husband believes that people who do not believe in Jesus Christ will go to eternal punishment, described in the Bible as "a place where there will be weeping and gnashing of teeth," and that if the wife does not accept Jesus Christ, as he has, that she will go to hell.

24. I find that the Boston Church of Christ services to which father has taken his children have included teachings that those who do not accept the Boston Church

of Christ faith are damned to go to hell where there will be "weeping and gnashing of teeth."

25. I find that the oldest child, Ari, has drawn from the above teaching the conclusion that his mother may go to hell, and that this causes him substantial worry and upset.

26. It is not disputed that the father earnestly believes in the teachings of the Boston Church of Christ. Indeed, the father has found a nurturing community in the church. The strength of the Boston Church of Christ community cannot be doubted as evidence by the presence and support of church members during the trial. The father attends a worship service on Sunday and prayer meetings during the week. The father lives with members of the Boston Church of Christ and spends the majority of his time socializing with church members. In sum, the Boston Church of Christ encompasses all aspects of the father's life, and the father endeavors to faithfully follow its teachings.

27. Following those teachings, the father's goal is to "live a Christ-like" existence. It is the father's dream to have his children become disciples of the Boston Church of Christ (indeed, the father candidly stated that he wishes everybody, including the court and wife's counsel, would accept the Boston Church of Christ). I credit the report of the G.A.L., as well as the husband's own testimony, that if his children did not accept Jesus, he would never stop trying to convert them. Presently, the father hopes to have his children attend Sunday School classes at the Boston Church of Christ.

28. The children's program at the Boston Church of Christ teaches the children to love Jesus. Indeed, the entire focus of the Boston Church of Christ is to love and to emulate Jesus Christ.

29. I have relied upon the testimony of Stephen Hassan to this *limited* extent *only*: insofar as it shed light upon the beliefs and tenets of the Boston Church of Christ. Because I find that Hassan has studied the Boston Church of Christ in depth, and has knowledge of the beliefs and tenets of this religion far surpassing that of the average individual, I credit his expertise. However, the majority of Hassan's testimony was offered for other purposes (i.e. cults, mind control, deception, etc.) and I have disregarded it entirely for all such other purposes. Further, on the limited issue of the beliefs and tenets of the Boston Church of Christ, where Hassan's testimony was consistent with the trial testimony of members or leaders of the Boston Church of Christ, regarding the beliefs and tenets of the Boston Church of Christ, I have accepted it and relied upon it. Where Hassan's testimony was inconsistent with the trial testimony of members or leaders of the Boston Church of Christ, I have not relied upon Hassan, but rather have relied upon the testimony and description of the actual church members (which Hassan is not).

30. Both parents share this view: that Jews do not believe that Jesus was the son of God, while Christians do believe that Jesus was the son of God. (See G.A.L. report at page 4). I further find that both parents share this view: that Jews do not believe, as a matter of religious doctrine, that wives must submit to their husbands in a case of disagreement, while members of the Boston Church of

Christ, based upon passage(s) from the Bible, do believe that "there is only one leader of the house and it is the father," and that "when there is a real decision and there is a real impasse, mother needs to trust that father knows what he is doing, she needs to submit."

B. Sexual and Other Conduct:

31. I find that there were multiple occasions of infidelity by the parties during their marriage. On two or three occasions the parties together engaged in group sex with a third party, a woman named Elizabeth, with whom the wife had had a sexual relationship prior to marriage. Each party states that the other initiated these sexual encounters with Elizabeth, but both parties participated, regardless of who initiated the event.

32. In addition, on one occasion the wife had a sexual encounter with another man, Ken, while she was visiting New Jersey.

33. I credit the testimony of both parties that they each have smoked marijuana during the course of their marriage and that neither is any longer doing so.

AGE OF THE PARTIES:

34. The wife was age 33 at time of trial.

35. The husband was age 34 at time of trial.

HEALTH OF THE PARTIES:

36. The health of the wife is good.

37. The health of the husband is good.

STATION OF THE PARTIES:

38. But for the largess of the wife's parents, the parties would have lived in poverty. However, due to the support provided them by the wife's parents, the station of the parties during their marriage was middle class. Specifically, they were able to buy a house, several automobiles (including a Mercedes), and fund a small business (no longer operated by the parties).

OCCUPATION:

39. The wife is presently a full time homemaker and caretaker of the three children. In the past, she has occasionally provided postpartum neonatal care to clients referred by Mothercare, Inc., which provided her with training and for which she has received Red Cross certification.

40. The husband was unemployed at the time of trial. However, he is scheduled to begin training for a full time position with Boston Financial. He also possesses a valid real estate license.

AMOUNT AND SOURCES OF INCOME:

41. The wife presently has no source of income and receives all of her support from her parents. The husband is actually paying her nothing; despite court orders to the

contrary. The wife has, in the past, taken on an occasional neonatal care client which provided her with minimal income, but due to the fact that she is responsible for three young children, it is unlikely that she will be able to work steadily outside the home in the near future.

42. The husband presently has no income, but will soon be employed by Boston Financial at a rate of $10 per hour for 40 hours per week.

VOCATIONAL SKILLS:

43. The wife has a bachelor's degree in language from Tufts University. She has vocational skills in post-partum neonatal care.

44. The husband has a bachelor's degree in mechanical engineering from Northeastern University. His vocational skills are primarily related to sales.

EMPLOYABILITY:

45. I find that the wife's employability is fair. She has worked intermittently as a home health care aide (neonatal care) over a three year period, and she has worked briefly in insurance sales.

46. I find that the husband's employability is fair. His employment history has been sporadic, punctuated by changes in direction and periods of unemployment.

ESTATE OF THE PARTIES:

47. The estate of the parties consists primarily of a home in Sharon, which was purchased for $180,000 in

1990 with cash provided exclusively by the wife's mother. The present fair market value of the house is $210,000.

48. The wife and another individual own a condominium in East Boston. This unit is presently unoccupied, and even when rented, the expenses exceed the rental income. Thus, this "asset" is really a liability.

LIABILITIES AND NEEDS:

49. There is no outstanding mortgage on the marital home. The mortgage on the East Boston condominium is a liability. Both parties will owe substantial attorneys fees as these divorce proceedings have been acrimonious and protracted.

OPPORTUNITIES FOR FUTURE ACQUISITION OF CAPITAL ASSETS AND INCOME:

50. The wife's opportunity to acquire future income from employment is limited by her child caretaking responsibilities. However, the wife's parents, who are divorced, have provided substantial financial support to the wife throughout her life, and it is reasonable to assume they may continue to assist the wife financially.

51. The husband's opportunity to acquire future income from employment is fair. The husband is from a blue collar family and he does not have any reasonable expectation of financial support or inheritance from them.

HEALTH INSURANCE:

52. The husband is presently unemployed and provides no health insurance coverage for his family. In addition, although he expects to begin employment with Boston Financial, he will not be provided health insurance coverage through that employment.

PRESENT AND FUTURE NEEDS OF DEPENDENT CHILDREN:

53. I rely heavily upon the G.A.L. in this matter, Dr. Michael Goldberg. The G.A.L. has a Ph.D. in clinical psychology, with a specialty in child psychology. His background and experience is impressive; he has worked at Children's Hospital in Boston in their Department of Psychiatry, at Judge Baker Children's Center, at Harvard Medical School, and at Massachusetts General Hospital. He has served as court-appointed G.A.L. on many previous occasions. He has published and taught widely. His report is really a tome, covering over 30 pages of small, single-spaced print. The G.A.L. interviewed all three children, both parents, conducted parent-child observations and home visits, contacted the children's teachers, and conducted psychological testing. The G.A.L.'s report is lengthy and detailed, and I will not attempt to summarize it here, although where I have made findings based upon particular excerpts, those excerpts are quoted in my findings. Nevertheless, the G.A.L. report as a whole is so comprehensive and thoughtful and the rationale so detailed, *that any appellate review of this matter should include a reading of the G.A.L. report in its entirety.*

54. I credit the G.A.L.'s conclusions that father (as well as social science scholars as specified in the G.A.L. report) understands that Jewish identity is more than a set of religious beliefs. Rather, Jewish identity tends to be accepted as membership in an *ethnic* group rather than just a *religious* group, and Jews "conceive of themselves as alike by virtue of their common ancestry, real or fictitious, and are so regard[ed] by others" (Shibutani & Kwan, 1965). Ethnicity is a sense of commonality transmitted over generations by the family and reinforced by the surrounding community. It is more than race, religion, or national and geographic origin. It involves conscious and unconscious processes that fulfill a deep psychological need for identity and historical continuity (Giordano & Giordano, 1977). Ethnic identity patterns one's thinking, feeling, and behavior in both obvious and subtle ways. It plays a major role in determining how one eats, works, relaxes, celebrates holidays, how one feels about life, death, etc.

55. The scholarly work and research of Klien (1980) with Jews, Cobbs (1972) with African-Americans, and Giordano and Riotta-Sirey with Italians, demonstrated that if people are secure in their ethnic identity, then they can act with greater freedom, flexibility, and openness to others of different cultural backgrounds. However, this literature indicates that if people receive negative or distorted images of their ethnic background they often develop a *sense of inferiority and self-hate* that can lead to aggressive behavior and discrimination toward other ethnic groups.

56. Father's behavior toward his children fosters negative and distorted images of the Jewish culture.

Father insists that all individuals who do not accept his belief about life and existence are sinners who are destined to tortuous punishment. Father opposes his children being taught the history of the Holocaust. Further, father's cutting off of Ari's religiously meaningful side burns (payes), and his threats to cut off his clothing fringes (tzitzitz) show that he does not refrain from inducing guilt in the child for having the beliefs that he does.

57. I find that Ari has a strong Jewish self-identity. I am persuaded by the report of the G.A.L. that Ari "clearly identified himself and his siblings as being Jewish and provided a rationale based on Jewish law for his belief that he is Jewish," and that the child's "behavior in which he ascribes his Jewish identity to Jewish law and theology is indicative of his attainment of a former self-identification of himself as a Jew." Indeed, father himself reluctantly concedes that if asked, Ari would unquestionably say he is Jewish.

58. Father understands that Ari perceives himself as Jewish, and that having a Jewish identity is akin to having an ethnic identity. But the matter goes further. Ari perceives his Jewishness as being part of his "soul". For Ari, efforts to convince him that his religion is wrong are logically equated with convincing him that his "soul" is damaged or inadequate. (G.A.L. report, pp. 27-28).

59. I credit the G.A.L.'s report and testimony that Ari "may experience choosing a religion as choosing between his parents, a task that is likely to cause him significant emotional distress." In fact, the G.A.L. specifically concludes, and I credit his conclusion, that the

children are now in a position where they are perilously close to being forced to choose between their parents, and to reject one.

60. I find, based upon the G.A.L.'s report as well as his testimony, that the oldest child Ari " . . . is emotionally distressed by the conflict between his strong desire for affection and approval from his father and his desire to maintain his Jewish religious practice," and that as a direct result " . . . there has been a decline in his motivation and academic performance."

61. I find that Ari is very bright but that his school functioning has deteriorated significantly recently. Whereas in the past, he was enthusiastic about Judaic studies, he now seems distracted and uninterested. He does not engage with the material in the deep and insightful way that he used to.

62. I find that Ari is understandably uncomfortable and unhappy when he "has to do the stuff [he's] not supposed to do on Shabbas", and that precisely as the G.A.L. indicates, Ari then has the no-win dilemma of pleasing and obeying his father (while displeasing and disobeying his mother and his own internalized beliefs about how the world is "supposed" to function on the Sabbath) or the reverse. Poor Ari: he told his father that he "wants to celebrate the Sabbath and not do stuff that I'm not supposed to do", and his father's response was "we'll discuss that with the lawyers."

63. Ari's current belief system appears to allow him to accept his father without needing to change him.

64. I credit the G.A.L.'s report that "Moriah is experiencing emotional distress related to the parental conflict . . . " I find that Moriah has a very solid understanding of who she is and who her family is "I'm not Christian. I'm Jewish. Mom is Jewish. My dad is Christian. My brother is Jewish and my sister is Jewish." Moriah's straightforward description is comfortable, and age-appropriate. More importantly, it is accurate. And most important of all, it shows that she can tolerate the knowledge of her parents' religious differences.

65. Rebekah is too young to have formed a Jewish identity, although given the fact that Rebekah will most likely reside with the mother and her two older siblings, she will almost certainly develop such an identity. (G.A.L. Report, p. 25).

66. I find, based upon the G.A.L.'s report, that Rebekah is likely to experience " . . . a sense of not belonging in her own home" by " . . . anything that serves to promote her identity as fundamentally different from that of her mother and siblings." I find this would be substantially to her detriment.

67. I credit the report of the G.A.L. that "should the children come to accept the religious beliefs that the father reports he wants them to accept, they are likely to come to view their mother negatively and as a person who will be punished for her sins . . . " resulting in a " . . . negative impact on their relationship with their mother . . . and difficulty accepting guidance and nurturance from her." I find this would be to the children's substantial detriment.

68. For children of tender years (and it seems to me that this likely means at least up to age 12), I find directly contradictory messages from trusted adults to be solidly contrary to their best interests.

69. I find that the children are in need of child support, that the Child Support Guidelines are fully applicable, and that child support consistent therewith will be $125 per week, assuming father's anticipated job materializes.

70. I find that both parents attended college (Tufts University and Northeastern University) and that the three children are good candidates to attend college.

III. RATIONALE OF JUDGMENT:

The primary issue to be decided in this matter is how to least restrict father's right to choose and practice the religion of his choice, while at the same time to protect the children from being literally pulled apart by their parents, who have come to have a profound difference in religious belief.

It is clear from the testimony of the parties that they agreed prior to their marriage that they would have a Jewish home and that their children would have Jewish identities. Their marriage began with a Jewish ceremony, and with the birth of each child, their Jewish identity was established, reinforced, and has been embraced by the children. The husband agreed to this and was fully supportive, early in the marriage, of setting the children off on this course in life, including accepting the financial support of the wife's mother to send the children to

private Jewish school. Thus, the children (especially Ari and Moriah) have had a solid Jewish "start" to their lives, and have solidly developed Jewish self-identities at this point in time. Unlike the children in the *Felton* case, and unlike the children in the *Zummo* case, the father asserts a right not simply to expose the children to a different religion, but to *strip* the children of their existing religion, which will have the accompanying result of alienating them from their mother. These children are not just being exposed to two competing religions, they are being forcibly stripped. Father was present and acquiescent when the children were consistently molded as Jews: from the initial selection of their Hebrew names, through the weekly family Sabbath cerebration, the Jewish summer camp, the Jewish private school, etc. At least the older two children (less so the youngest, given her age) were well-launched down a Jewish pathway, when their father chose to depart from that path. It is one thing for him to do so, and quite another for him to drag his children with him, for in so doing, as the G.A.L. highlights, he attacks not just their religion, but their ethnicity, their very "soul". At some time when the children are older, they can probably perceive this as a healthy questioning process, an invitation to introspection about religion, and the like. But at this point in time, father's attempts to have the children reject Judaism and accept Christ is a damaging attack on the children's emotional health.

While the holding of the *Zummo* case cautions me not to pessimistically throw in the towel and declare that Judaism and Christianity are "irreconcible" – and I do not do so – I recognize that this particular orthodox Jew does

not believe in Jesus Christ, and that this particular fundamentalist Christian believes fervently in Jesus Christ, and further believes that those who do not so believe will burn in hell. I further recognize that the former does not believe that women must be submissive to men in matter of impasse (indeed, she rejects that view as having no basis in religion) and the latter believes it as a matter of Biblical text and religious requirement. The 7-year-old and 5-year-old children are now confronted with the task of trying to resolve, or pick between, such profoundly conflicting messages from the two most trusted adults in their lives. These are head-to-head conflicts, not simply variations on a theme. The children need protection from frightening messages, such as that unless they and their mother accept Jesus Christ, they and their mother will got to eternal punishment and burn in hell, where there will be weeping and gnashing of teeth.

I must reluctantly entirely prohibit the children from being taken to father's church or its Sunday School, even though I would have wished to craft a less intrusive restriction, because the evidence taken as a whole persuades me that if the children attend the Boston Church of Christ at all, there will in fact be a constant, if not relentless, stream of exhortations about accepting Jesus and renouncing all else, as well as frightening messages about the consequences to those who fail to do so. I have been able to adopt a lesser degree of restriction upon visitation between father and the children outside of church (for example, in father's home or with his friends).

I specifically make no finding as to whether one religion is better, truer, or more valid that the other. In

addition, I decline to make any finding as to whether the Boston Church of Christ is a cult, or whether it employs techniques of mind control, deception, or brainwashing.

Jeff Kendall, as well as several members or leaders of the Boston Church of Christ, speaks frequently and vehemently about the crucial importance of coming to a "right" relationship with God. This particular choice of phrase (consistently used) suggests not only to me, but I think to any listener (particularly a child listener) that any relationship with God that is not through the Boston Church of Christ is "wrong." In so finding, I am mindful of Jeff Kendall's testimony that a person could be a Jew, practice Jewish traditions (such as seder, etc.), observe the sabbath, keep Kosher, and all that would be "OK" with his church, *"so long as you accept Jesus."* Again, the doctrine and dogma of Jeff Kendall's religion promotes *rejection*, not tolerance, of any person or religion that does not accept Jesus.

I specifically find that father's religion leaves no room for tolerance of other religions, and here is where the crux lies. Indeed, father is so "touchy" about the supremacy and exclusivity of his religion, that he first complains that the children are developing an "us vs. them mentality" in which he is "in the them category," but then illogically supports this claim with the factual observation that his children report that they are Jewish and he is not. Of more concern, father has been upset that the children have been taught about the Holocaust, as if this is nothing more than another example of "us vs. them," with him in the "them" category.

What then to do with this stand-off? I find it substantially damaging to the children to leave each parent free to expose the children as he/she wishes, to his/her religion. Instead, I have attempted to construct a plan that requires the father not to strip the children's Jewish ethnic and religious identity, and not to promote their alienation from their mother. (G.A.L. Report, p. 30). I am mindful of the pitfall that the Massachusetts Supreme Judicial Court frowned upon in *Felton*: an order that would require "subtle interpretation and raise infinite difficulties of enforcement." However, on issues of substantial importance such as this, the Court can and should make itself available to interpret particular facts and situations as they may present themselves, and the Court need not shirk the likely responsibility of having these parties come before the Court again, after the Judgment is issued and implementation is underway. I am mindful that "duality of religious beliefs, per se, [cannot be assumed to create] conflict in young minds." (*Felton* at 240). Thus, I have not assumed it, and I have relied exclusively upon specific facts as I have found them.

I have not thrust the mother's religion upon the father – I have not required the father to observe the Jewish Sabbath, or kosher laws, or any other "Jewish" practices, as a prerequisite to having meaningful visitation with his children. I have simply required him to refrain from exhorting the children to reject Judaism. Thus, for example, father may have pictures of Jesus Christ hanging on the walls of his residence, and that will not serve as any basis for restricting his visitation with his children. But, father may not take the children to religious services where they receive the message that

children and adults who do not accept Jesus Christ as their lord and savior are destined to burn in hell.

There is surface appeal to the father's argument that the mother has not met her burden of establishing substantial present harm to the children from exposure to father's religious beliefs and practices, for the G.A.L. found only a few instances of concrete present harm to the children. I am mindful that the G.A.L. has not found current damage to the children so severe that it has caused them to suffer a psychotic break, or to have a "formal psychiatric diagnosis" (G.A.L. Report, p. 24). The case law does not require the court to wait for formal psychiatric breakdown and the evidence paints a strong picture of the reasonably projected course if the children continue to be caught in the cross-fire of their parents' religious difference: father's religion may alienate the children from their custodial parent (she is bad, she will burn in hell), and may diminish their own sense of self-worth and self-identity (Jews are bad, Jews will burn in hell). At minimum they will be called upon to "choose" between their parents, in itself a detrimental result. The G.A.L. predicts damaging consequences of the children's exposure to two vastly different, and on some points directly contradictory religious views. "Sometimes . . . a diversity of religious experience is itself a sound stimulant for a child . . . the question that comes to the courts is whether, in particular circumstances, such exposures are disturbing a child to its substantial injury, physical or emotional, and will have a like harmful tendency for the future." (*Felton*, at 234-35). Applying that standard to the facts of this particular case, I see substantial evidence of

current and imminent harm, to these 7, 5, and 3-year-old children.

As the children become older, it may well be possible for them to tolerate increasing exposure to directly conflicting religious beliefs, and to accept or reject religious beliefs of practices based upon their own choice(s) and ideas. Thus, my Judgment includes the express invitation to the parties for periodic court review, and expert evaluation, of the status of the children as they mature, and of what visitation provisions or restrictions are warranted. The present terms of my Judgment concerning visitation are not at all necessarily the blueprint for the entire childhood of these children.

Turning to the financial dispute between the parties (which pales by comparison to the religious dispute), I have divided the one valuable asset of this marriage (the house in Sharon) 75% to the wife and 25% to the husband, based primarily upon the factor that the wife's mother provided the entire funding (about $200,000) for the purchase of this house. Under these circumstances, the more usual 50%/50% division would be inequitable, but an award of 100%/0% would also be inequitable, since the house was unquestionably a completed gift. I have computed child support in accordance with the Child Support Guidelines. Finally, I have awarded the condominium (which is really a liability and not a asset) to the wife, as she has always been the sole owner and operator of that unit.

IV. CONCLUSIONS OF LAW

1. It is well established that the first amendment to the U.S. Constitution guarantees each citizen the right to freedom of religion and also requires a separation between Church and State such that no state may unreasonably interfere in a person's religious affiliations, even as they relate to the family. *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972).

2. "The law . . . tolerates and even encourages up to a point the child's exposure to the religious influences of both parents although they are divided in their faiths." *Felton v. Felton,* 383 Mass. 232 at 234 (1981).

3. "If accommodation appears necessary, that form should be sought which intrudes least on the religious inclinations of either parent and is yet compatible with the health of the child." *Felton v. Felton,* 383 Mass. 232 at 235 (1981).

4. Parents together have freedom of religious expression and practice which enters into their liberty to manage the familial relationship . . . But the "best interests" of the child are to be promoted, and when the parents are at odds, the attainment of that purpose may involve some limitation on the liberties of one or other of the parents . . . However, harm to the child from conflicting religious instructions or practices, which would justify such a limitation, should not be simply assumed or surmised; it must be demonstrated in detail. *Felton v. Felton,* 383 Mass. 232 at 233-234 (1981). Herein, I have found (similar to the trial judge in *Felton*) that father's attempted indoctrination of the children in his faith "confused and disoriented the children and in some degree

alienated them from [mother]" (*Felton* at 232), but unlike the trial judge in *Felton*, I rely not upon assumption, but rather upon a "qualified investigator (whether called a guardian or given some other title) who would look into the facts, render a report, and be subject to examination by the parties" (*Felton* at 242), and specifically upon that investigator's report about the "physical and emotional consequences to the children [from the religious conflict]" (*Felton* at 233) and the children's "general demeanor, attitude, school work, appetite, health, or outlook" and whether those have been "affected one iota by the [conflict]" (*Felton* at 242).

5. "Courts have a duty to consider whether religious beliefs threaten the health and wellbeing of a child." *LeDoux v. LeDoux*, 234 Neb. 479, 452 N.W.2d 1, 5 (1990) (citing *Burnham v. Burnham*, 208 Neb. 498, 304 N.W.2d 58 (1981)).

6. "Prohibiting a Court from considering 'religious factors under any circumstances would blind courts to important elements bearing on the best interests of the child.' " *LeDoux v. LeDoux*, 234 Neb. 479, 452 N.W.2d 1, 5 (1990) (citing *Burnham v. Burnham*, 108 Neb. 498, 304 N.W.2d 58 (1981), quoting *Bonjour v. Bonjour*, 592 P.2d 1233 (Alaska 1979)).

7. "[T]he rule appears to be well established that the courts should maintain an attitude of strict impartiality between religions and should not disqualify any applicant for custody or restrain any person having custody or visitation rights from taking the children to a particular church, *except where there is a clear and affirmative showing that the conflicting religious beliefs affect the general welfare of*

the child." Funk v. Ossman, 150 Ariz 578, 714 P.2d 1247, 1250 (Ariz. App. 1986) (emphasis added), citing *Munoz v. Munoz,* 79 Wash.2d 810, 489 P.2d 1133, 1135 (1971).

8. Where rigid religious beliefs (including labelling "God's enemies", and poisoning the children's minds against the other parent) are actually harmful to the children, a court may restrict a parent's rights. *Leppert .v Leppert,* 519 N.W.2d 287 (N.D. 1994)

9. "[W]hen a court finds that particular religious practices pose an immediate and substantial threat to a child's temporal well-being, a court may fashion an order aimed at protecting the child from that threat." *Osier v. Osier,* 410 A.2d 1027 (Me. 1980) (citing *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1965) and *Levitsky v. Levitsky,* 231 Md. 388, 190 A.2d 621 (1963)).

10. "Although secular courts have no place deciding one religion is better than another . . . they do have the duty of objectively determining whether a belief system's secular effects are likely to cause physical or emotional harm to children." *Leppert v. Leppert,* 519 N.W.2d 287, 291 (N.D. 1994).

11. In accommodating diverse religious practices of parents living apart, any harm to the child from conflicting religious practices or instructions, which would justify limitation of liberties of one or other of the parents, should not be simply assumed or surmised, it must be demonstrated in detail and supported by sufficient evidence. *Felton v. Felton,* 383 Mass. 232, 233 (1981).

12. The question whether or how to accommodate diverse religious practices of parents, living apart, in the

upbringing of minor children, is not unfamiliar one in State courts, but has not had much attention in Massachusetts. *Felton v. Felton*, 383 Mass. 232, 233 (1981).

13. "[I]n custody cases there is no substitute for hard and meticulous fact-finding by the trial court. The great jurists who have had something to say about child custody have recognized this and have avoided over-generalization and absolutes." Carolyn R. Wah, *Religion in Child Custody and Visitation Cases: Presenting the Advantage of Religious Participation*, 28 Family Law Quarterly 269, 287 (1994).

14. "In all events, the question that comes to the courts is whether, in particular circumstances, such exposures are disturbing a child to its substantial injury, physical or emotional, and will have a like harmful tendency for the future." *Felton v. Felton*, 383 Mass. 232, 235 (1981).

15. "It is often said that if accommodation appears necessary, that form should be sought which intrudes least on the religious inclinations of either parent and is yet compatible with the health of the child." *Felton v. Felton*, 383 Mass. 232, 235 (1981), citing *Osier v. Osier*, 410 A.2d 1027 (Me. 1980). When the evidence is sufficient to demonstrate the need for State intervention, the remedy should be that which intrudes the least on the religious inclination of either party and is yet compatible with the health of the child. *Kirchner v. Caughey*, 326 Md. 567, 606 A.2d 257, 262 (Md.Ct. App. 1992).

16. The law does not permit a Court to presume or speculate as to harm to children from exposure to conflicting religious beliefs or practices. *Felton v. Felton*, 383 Mass. 232 (1981).

17. Something more than general testimony that a child is "confused" or "upset" by conflicting religious practices is required; mere conclusions and speculations will not suffice. *Kirchner v. Caughey,* 326 Md. 567, 606 A.2d 257, 262 (Md. Ct. App. 1992).

18. "[A] court must narrowly tailor its order so as to result in the least possible intrusion upon constitutionally protected interests of the parent." *Osier v. Osier,* 410 A.2d 1027 (Me. 1980).

19. "[T]he speculative possibility of mere disquietude, disorientation, or confusion arising from exposure to 'contradictory' religions would be patently insufficient 'emotional harm' to justify encroachment by the government upon constitutional parental and religious rights of parents, even in the context of divorce." *Zummo v. Zummo,* 394 Pa. Super. 30, 70, 574 A.2d 1130, 1155 (1990).

20. "Though no uniform age of discretion is set, children twelve or older are generally considered mature enough to assert a religious identity, while children eight and under are not. [J]udges exercise broad discretion on a case by case basis in determining whether a child has sufficient capacity to assert for itself a personal religious identity." *Zummo v. Zummo,* 394 Pa. Super. 30, 574 A.2d 1130, 1149 (1990).

21. A Court cannot determine that apparently conflicting religions are "irreconcilable" as this is a theological and philosophical issue, not an issue for judicial determination. *Zummo v. Zummo,* 394 Pa. Super. 30 (1990).

22. The Court cannot assert a need for religious stability of the children as that involves the State in matters of

religions and preference, which are unconstitutional inquires. *Zummo v. Zummo,* 394 Pa. Super. 30 (1990).

23. If a choice must be made between meaningful visitation for one parent and the chosen program of religious indoctrination of the other parent, the court must prefer the preservation of the parent-child relationship through visitation. *Zummo v. Zummo,* 394 Pa. Super. 30, 574 A.2d 1130, 1158 (1990).

Supreme Judicial Court for the
Commonwealth of Massachusetts
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

Robert A. Bertsche, Esquire
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RE: No. SJC-07427

BARBARA ZEITLER KENDALL
vs.
JEFFREY P. KENDALL

NOTICE OF DENIAL OF PETITION FOR REHEARING

The Petition for Rehearing filed in the above captioned case has been considered by the Court and is denied.

Jean M. Kennett, Clerk

Dated: January 27, 1998

TO: David E. Cherny, Esquire
Michael S. Greco, Esquire
Robert A. Bertsche, Esquire
Melissa J. Solomon, Esquire
Norfolk Probate and Family Court

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December 23, 1997

BY HAND

Chief Justice Herbert P. Wilkins
Supreme Judicial Court
New Courthouse
Boston, MA 02108

RE: *Barbara Zeitler Kendall v. Jeffrey P. Kendall – SJC-07427*

Dear Chief Justice Wilkins:

Defendant-appellant Jeffrey P. Kendall ("Jeffrey") hereby petitions the Supreme Judicial Court for rehearing of this matter pursuant to Mass. R. App. P. 27. In accordance with the rule, I enclose seven copies of this letter. An additional copy of this letter is being delivered by hand to David E. Cherny, counsel for plaintiff-appellee Barbara Kendall ("Barbara").

Introduction

As grounds for this petition, Jeffrey respectfully submits that the Supreme Judicial Court overlooked and misapprehended the standard of review appropriate to this action. The Court applied the "clearly erroneous" standard to the Probate Court's findings of facts. *Kendall v. Kendall*, No. SJC-07427 (Dec. 9, 1997), slip op. at 7 ("We uphold the judge's factual findings unless they are clearly

erroneous"). That deferential standard of review is inappropriate in this case, which involves First Amendment rights of freedom of speech, freedom of religion, and freedom of association. As this Court ruled earlier this year, in a case decided during the briefing period for this case, an appellate court reviewing a case involving "constitutionally protected speech" is required to engage in "independent appellate review" of the trial court record. *Planned Parenthood League of Massachusetts, Inc. v. Bell*, 424 Mass. 573, 579, *cert. denied*, 118 S.Ct. 72 (1997). Because the Court failed to apply independent appellate review in this case, and indeed paid extraordinary deference to questionable and in instances unsupported "factual" findings of the Probate Court, the matter should be reheard and decided on the basis of the stricter standard that the Court has ruled to be appropriate in a case such as this.

Had the proper standard of review been applied, the Court would have reached a different conclusion. The Court's decision relied heavily on the lower court's findings – based on the lower court's wholesale and unquestioning adoption of the report of the court-appointed guardian ad litem – that the Kendall children were suffering emotional distress as a result of their parents' religious conflict sufficient to require the court to take the extraordinary step of barring the father from sharing his religion with his children. In fact, as argued in Jeffrey's briefs to this Court, the evidence on such issues found very little support in the factual record, and should not have been credited.

Argument

I. The Court Overlooked and Misapprehended the Standard of Review for this Case, Which Raises First Amendment Issues.

In cases raising First Amendment issues, such as *Kendall*, the United States Supreme Court has repeatedly held that the "requirement of independent appellate review . . . is a rule of federal constitutional law." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 498-511 (1984). *See also New York Times Co. v. Sullivan*, 376 U.S. 254, 284 (1964). This doctrine of "independent review" is an exception to the general rule that "findings of fact shall not be set aside unless clearly erroneous," embodied in Rule 52(a) of both the Massachusetts and federal rules of civil procedure. The independent review standard requires the appellate court to review the trial court record *de novo*.

In its decision in this case, the Supreme Judicial Court relied instead on the Rule 52(a) standard, as set out in *Williams v. Resolution GGF OY*, 417 Mass. 377, 381 (1994) and *Marlow v. New Bedford*, 369 Mass. 501, 508 (1976). However, neither *Williams* nor *Marlow* involved federal constitutional questions.[1] The Court also cited *Felton v. Felton*, 383 Mass. 232, 239 (1981), a case in which this Court *reversed*, on the grounds of insufficient evidence, a probate judge's finding that a father's religious

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[1] *Williams* involved a suit by mortgagors against a second mortgagee claiming violations of the statutory obligation to mortgagors. *Marlow* involved an action by a city resident against the city to enjoin continuation of a project to widen a city street without an environmental impact statement.

practice had a deleterious effect on his children. The *Felton* court found "clear error" in the probate judge's fact-finding, but did not expressly discuss the doctrine of independent appellate review. Nonetheless, the *Felton* court noted that when a court considers limitations on parents' freedom of religious expression and practice for the sake of the "best interests" of the child, "harm to the child from conflicting religious instructions or practices, which would justify such a limitation, should not be simply assumed or surmised; it must be demonstrated in detail." *Felton*, 282 Mass. at 234.

While independent appellate review does not limit the Supreme Court's deference to a trial court on matters of witness credibility, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 567 (1995) (citations omitted), it requires the Supreme Court to "review the findings of fact by a State court . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *Id., quoting Fiske v. Kansas*, 274 U.S. 380, 285-286 (1927).

The Supreme Court has set forth two different justifications for requiring an appellate court to make an "independent examination of the whole record . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *Sullivan*, 376 U.S. at 285. First, the need for independent review arises from the difficulty of espousing constitutional principles in abstract terms; "it is only by the examination of individual cases that the principles can be applied and the lower court's understanding of those principles verified." Wright & Miller, *Federal Practice and*

Procedure § 4036 (1988, 1997 Supp.). Second, thoroughgoing review by appellate judges is necessary "in order to preserve the precious liberties established and ordained by the Constitution." *Bose*, 466 U.S. at 511. "Particularly is this so where a decision here for review cannot escape broadly social judgments – judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship." 466 U.S. at 501, n.16.

Accordingly, the Supreme Court has extended the requirement of searching appellate review to a broad range of First Amendment cases, as well as to cases implicating other federal rights, such as double jeopardy, waiver of federal rights, Commerce Clause protections, and full faith and credit. *See* Wright & Miller, *supra*, § 4033, at 464 (citing cases). "There is no obvious principle that would limit the approach to such areas, and the Court remains free to extend it to all federally protected rights." *Id.*

Indeed, that is exactly what this Supreme Judicial Court has done. Earlier this year, this Court expanded independent appellate review to cases involving "constitutionally protected speech."[2] *Planned Parenthood League of Massachusetts, Inc. v. Bell*, 424 Mass. 573, 579, *cert. denied*, 118 S.Ct. 72 (1997). In *Bell*, an abortion clinic

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[2] Before 1997, the Massachusetts Supreme Judicial Court had applied the independent appellate review doctrine only in libel cases, where the court reviewed the record for evidence of "actual malice." *Draghetti v. Chmielewski*, 416 Mass. 808, 815, n.10 (1994); *McAvoy v. Shufrin*, 401 Mass. 593, 597 (1988); *Twohig v. Boston Herald-Traveler Corp.*, 362 Mass. 807, 810, n.2 (1973).

sought injunctive relief against a protestor. Noting that "the challenged activity on which the judge based the issuance of the injunction is in the nature of constitutionally protected speech," this Court invoked the independent appellate review doctrine:

> Bell's invocation of the First Amendment requires us to engage in an independent examination of the whole record to "decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection," notwithstanding the trial judge's conclusion to the contrary.

Id. at 579-580.

The *Bell* opinion cited *Hurley v. Irish-American Gay, Lesbian & Bisexual Groups of Boston*, 515 U.S. 557, 115 S.Ct. 2338, 2344 (1995) for the proposition that "the requirement of independent appellate review is a rule of Federal constitutional law." *Bell*, 424 Mass. at 580, *citing Hurley*, 115 S.Ct. at 2344. In *Hurley*, the United States Supreme Court struck down a decision of this Court after applying independent appellate review in the context of determining whether the Massachusetts public accommodation law required the defendants to alter the expressive content of their parade in violation of the First Amendment.

Both the United States Supreme Court and the Massachusetts Supreme Judicial Court, therefore, have expanded the doctrine of independent appellate review, at least in principle, to apply to all "constitutionally protected speech." Although neither this Court nor the Supreme Court has had occasion to apply the doctrine to cases involving religious speech and freedoms, there is no basis for applying the strict independent review standard

to some parts of the First Amendment and not to others. Religious worship and discussion are "forms of speech and association protected by the First Amendment." *Wallace v. Jaffree*, 472 U.S. 38, 50 n.35 (1985), *quoting Widmar v. Vincent*, 454 U.S. 263, 269 (1981). *See also Board of Education v. Barnette*, 319 U.S. 624, 637 (1943) (Murphy, J. concurring) (noting that the First Amendment "secures the right to proselytize religious, political and ideological causes . . . ").

Moreover, the Supreme Court has cited approvingly the Third Circuit's application of independent appellate review in a case involving both the free speech and establishment clauses of the First Amendment.[3] *See Bender v. Williamsport Area School District*, 475 U.S. 534, 540, n.3, *reh'g denied*, 476 U.S. 1132 (1986) (vacating the Third Circuit's holding, however, on grounds that a school board member lacked standing to appeal). *But see May v. Cooperman*, 780 F.2d 240, 251 (3d Cir. 1985) (applying the "clearly erroneous" standard of review in case involving establishment clause).

Independent appellate review is particularly appropriate in the context of the First Amendment, the reaches of which are "ultimately defined by the facts it is held to embrace. . . . [W]e must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Hurley*, 515 U.S. at 567. *Sullivan* and *Bose* were defamation cases, in which the Supreme Court required independent appellate

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[3] *Bender* involved a suit against a school district challenging the constitutionality of a refusal to permit a nondenominational prayer club to meet during school hours.

review of whether the facts below established "actual malice." *Hurley* involved a question of whether the state court's application of the Massachusetts public accommodation law to require defendants to alter expressive content of their parade violated the First Amendment.

Similarly, this case requires this Court to determine whether Jeffrey Kendall's conduct in exposing his children to his religious beliefs falls on the "near or far side of the line of constitutional protection." *Hurley, supra.* Indeed, as this Court acknowledged, "[T]his appeal brings questions of law, fact and discretion." *Kendall,* slip op. at 6, n.10. This blurring of findings of fact and law in the context of the First Amendment is exactly the type of scenario which calls for independent appellate review. As the Supreme Court noted in *Bose*:

> At some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment. Where the line is drawn varies according to the nature of the substantive law at issue. Regarding certain factual questions in some areas of the law, the stakes – in terms of impact on future cases and future conduct – are too great to entrust them finally to the judgment of the trier of fact.

Bose, 466 U.S. at 501, n.17.

Dissenting from the Third Circuit's rejection of the independent appellate review standard in a case preceding *Bender, supra,* (in which the Circuit reversed itself and

adopted the independent appellate review standard), Circuit Judge Becker noted:

> Under *Bose*, plenary review is appropriate in a first amendment case whenever important "constitutional facts" are at issue, that is, whenever the district court's findings of fact presuppose a legal standard and have potentially grave effects on first amendment rights. The Supreme Court has recently stated this general principle: "Where, for example, as with proof of actual malice in First-Amendment libel cases, the relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law." *Miller v. Fenton*, ___ U.S. ___, ___, 106 S.Ct. 445, 452, 88 L.Ed.2d 405 (1985).

May v. Cooperman, 780 F. 2d 240, 260 (Becker, J., dissenting). The dissenting justice rejected the argument that the strict *Bose* standard should not be extended to establishment of religion cases:

> This position requires the implicit assumption that plenary review is more important when freedom of speech (or free exercise of religion) is at issue because an erroneous determination that speech (or religious exercise) is unprotected inhibits the expression of individuals' ideas and thus impairs personal freedom. To make explicit this assumption is to reveal its falsity, for one of the most fundamental of the Founding Fathers' tenets was that individuals must be free from governmentally imposed religion. The constitutional prohibition of established religion is

> surely as important as the guarantee of freedom of speech.

Id. at 260-61 (Becker, J., dissenting) (footnote omitted).

II. Application of the Independent Review Standard Compels this Court to Reverse the Probate Court's Ruling.

In the case before this Court, the relevant legal standard – harm to children "so substantial as to warrant a limitation on the defendant's religious freedom," *Kendall*, slip op. at 7, and "clear evidence of substantial harm," *id.* at 9 – "can be given meaning only through its application to the particular circumstances of a case." *Miller*, 106 S.Ct. at 452. However, this Court overlooked or misapprehended its duty to review the record *independently* of the Probate Court's findings, and decide for itself whether sufficient evidence supported the "factual" findings at the core of the lower court's decision. To the contrary, the Court merely repeated the lower court's findings, without any review of the sufficiency of the evidence supporting those findings. Had the Court looked behind the Court's findings, it would have found very little evidence to support key "facts." As Jeffrey argued in his briefs to this Court, the lower court overlooked substantial evidence that undermined many of the key findings made, first, by the guardian ad litem and then adopted by the lower court. These include the following:

- That the parents at the time of their marriage had never contemplated one parent migrating toward *Orthodox* Judaism, the doctrinal extreme of that religion, and had not agreed

to raise the children as *Orthodox* Jews (Jeffrey's Amended Brief ("Am. Br."), p.7; Jeffrey's Rebuttal Brief ("Reb."), p.2);

- That during the course of the marriage, Jeffrey, with Barbara's acquiescence, and without any demonstrated harm, took the children to Christian church services (Am. Br., p.8; Reb., p.2);
- That Jeffrey's displeasure with Ari's wearing a fringed *tsitsit* stemmed from his belief that Ari appeared disheveled; that Jeffrey apologized to Ari for criticizing his appearance; and that Ari forgave him instantly (Am. Br., p.9; Reb., p.3 & n.2);
- That Ari himself had requested the "whiffle" haircut that led to Jeffrey's cutting of his *payes* (Am. Br., p.9; Reb., p.3 & n.2);
- That Jeffrey never discussed with the children his Church's belief that those who do not accept Jesus are destined to hell(Am. Br., p.9);
- That a minister of Jeffrey's church testified that hell is "certainly not an emphasis" of the church (Am. Br., p.9);
- That a review of the evidence reveals that the Probate Court improperly did rely on a so-called expert on "cults [and] mind control" for testimony as to "typical things members of [father's church] might do or think," despite the court's insistence that it did not rely on such testimony (Am. Br., p.10 & n.13, p.26);
- That neither the Probate Court nor the guardian ad litem specified the basis for the

conclusion that any emotional distress suffered by the children stemmed from Jeffrey's religious views rather than the stress of the parents' divorce generally (Am. Br., pp.10-11, 16; Reb., p.3);

- That Jeffrey testified he was not trying to convert his children, and indeed testified that he considered Christian and Jewish beliefs to be compatible in creating for the children the "foundation of a relationship with God" (Am. Br., p.11; Reb., p.3);

- That the lower court pointed to no specific, let alone substantial, showing of harm to either of the two younger children (ages 3 and 5) stemming from exposure to their father's religion (Am. Br., p.15 & n.15; Reb., p.3).

Using the deferential "clearly erroneous" standard this Court, at page 13 of the slip opinion, noted that "[w]hether the harm found to exist amounts to the 'substantial harm' required to justify interference with [Jeffrey's] liberty interest is a close question . . . " Had this Court independently scrutinized the record, as Jeffrey urged the Court to do in his briefs, and as the Court is required to do under the "independent appellate review" standard set out in the *Planned Parenthood* case and other precedents of this Court and the United States Supreme Court, it would not be a "close question": the Court would be compelled to conclude there was insufficient evidence of substantial harm to the children to justify the substantial infringement of the father's First Amendment rights to freedom of speech, religion, and association.

Conclusion

For this reason, and for the reasons stated in Jeffrey's prior briefs, defendant-appellant Jeffrey P. Kendall requests that this Court grant his petition for rehearing.

Respectfully submitted,

JEFFREY P. KENDALL

By his attorneys,

/s/ Michael S. Greco
Michael S. Greco, BBO #208480
Robert A. Bertsche, BBO #554333
Melissa J. Solomon, BBO #629123
Carol V. Rose, BBO #634406

cc: David E. Cherny, Esq.

MSG/rab

*NOTE: JUDGE CRONIN ORDERED ON 3/1/96 THAT THIS REPORT SHOULD NOT BE REPRODUCED WITHOUT SPECIFIC COURT ORDER.**

COMMONWEALTH OF MASSACHUSETTS
THE PROBATE AND FAMILY COURT DEPARTMENT

Norfolk Division Docket # 94D 1947-D1

REPORT OF THE GUARDIAN AD LITEM
IN THE CASE OF:

BARBARA L. ZEITLER KENDALL

V.

JEFFERY P. KENDALL

Submitted
by:

Michael A. Goldberg, Ph.D.**
Child & Family Psychological Services, Inc.
49 Walpole Street, Suite 5
Norwood, Ma 02062
(617) 551-0999

March 1, 1996

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* Both the Massachusetts Supreme Judicial Court and the Family Court judge stated that the G.A.L. report "should be considered in its entirety on any appellate review." (App. 11, App. 42).

** The Guardian Ad Litem report is reprinted verbatim from the original, which was filed with the Probate and Family Court Department. All grammatical and typographical errors appeared in the original report.

SUBJECTS OF INVESTIGATION

	Name	DOB:	Age:
Parents			
Mother/ Plaintiff	Barbara Zeitler Kendall	1/18/63	33
Father/ Defendant	Jeffery P. Kendall	6/16/61	34
Minor Children			
Son	Ariel (Ari) Kendall	10/10/88	7 yrs, 3 mo.
Daughter	Moriah Kendall	5/19/91	4 yrs, 8 mo.
Daughter	Rebekah Kendall	4/21/93	2 yrs, 9 mo.

APPOINTMENT

I was appointed as Guardian ad Litem by Judge Christina L. Harms on October 12, 1995. The appointing order instructed me to investigate and report to the court on the following questions and matters:

1. What is the current parenting capacity of each parent?

2. What custody and visitation recommendations would I offer for consideration?

3. Are there any other specific matters or concerns regarding the best interest of the children that I would recommend that the Court address? and

4. I was asked to "address the inter-religious conflict between the parties in particular."

INFORMED CONSENT

All parties interviewed, including the children, parents, and collateral sources were informed that the information they provided could be used in the preparation of a report to the court and may be reviewed by the parties. The parties were informed that the client for which the GAL works is the court and that no data or reports would be released by the GAL to any party, other than the court itself, unless so ordered by the court. Each party indicated their understanding of the purpose of the evaluation, the limits of confidentiality, the lack of "privilege," and to whom the report would be released.

SOURCES OF INFORMATION

Interview/Observation Data:

Barbara Zeitler-Kendall 12/6/95 (1.25 hrs.); 12/12/95 (1.25 hr.); 12/19/95 (1 hr.)
Jeffery Kendall 12/8.95 (1 hr); 12/13/95 (1.5 hrs); 12/22/95 (1.25 hr.)
Ari Kendall 1/4/96
Moriah Kendall 1/4/96
Rebekah Kendall 1/4/96
All 3 children with mother 12/2/95
All 3 children with father 12/29/95

Many phone calls to both parents

Collateral Sources:
Educators

- Ms. Susan Butler
- Ms. Anne Sendor
- Ms. Nancy Sidman
- Ms. Lily Snow
- Ms. Karen Glaun

Record Review:

- 4/6/95-Plaintiff, Barbara Zeitler Kendall's, Affidavit in Opposition to Defendant's Motion to Modify Temporary Orders
- 6/16/95-Plaintiff's Answers to Defendant's Interrogatories
- 7/31/95-Affidavit of Jeffery P. Kendall in Support of Defendant's Motion for Reconsideration
- 8/3/95-Plaintiff, Barbara Zeitler Kendall's Affidavit in Opposition to Defendant's Motion for Reconsideration
- 8/23/95-Affidavit of Jeffery P. Kendall in Support of Opposition to Plaintiff's Motion for Reconsideration
- 11/30/95-Transcript of Deposition of Jeffery P. Kendall

Current Psychological Testing:

Mother:

Minnesota Multiphasic Personality Inventory-II (MMPI)

Father:

Minnesota Multiphasic Personality Inventory-II (MMPI)

Ariel:

Child Behavior Checklist (CBCL)-completed individually by mother and father

Rebekah:

Child Behavior Checklist (CBCL)-completed individually by mother and father

Moriah:

Child Behavior Checklist (CBCL)-completed individually by mother and father

NOTE ON THIS REPORT

It should be noted that vast amounts of data were collected and reviewed in the completion of this investigation. The data viewed as most relevant to the issues being investigated are reported herein. Some of the data

may be summarized for the purpose of limiting the length of this report. Impressions and potential resolutions are based on the consideration of all of the data reviewed.

Robert Kinscherff, Ph.D., J.D. served as a consultant for this case. Data and potential conclusions and recommendations were reviewed with Dr. Kinscherff. Also, Dr. Ruth Drasin assisted in the collection and reporting of some data. Dr. Drasin's services were conducted under the direct supervision of Dr. Goldberg who maintains responsibility for the use of that data.

RELEVANT CASE HISTORY

Mother and father were first introduced to each other by mother's cousin in August 1987. Father had dated this cousin for approximately 6 years and had been engaged to marry her. Both parents describe their courtship as "passionate." Approximately five months after meeting, mother became pregnant and the couple decided to marry.

Both parents acknowledge that they held many discussions about child rearing prior to marrying. They shared the desire to have three children. Both agree that they discussed the religious upbringing of the children at length, including discussions with two Rabbis. Father reported that mother had made her intention to raise the children in the Jewish faith explicit before their marriage and that he agreed to "support" her in raising the children in the Jewish faith. He stated that he expected the children would be raised Jewish and that he had no intention to interfere with this aspect of their upbringing.

Father acknowledged that he and mother had pre-marital counseling with Rabbi Jeffery Summitt in which child-rearing was explicitly discussed. Father believes that he "probably" agreed to raise the children Jewish in the presence of Rabbi Summitt.

Mother and father participated in Jewish education classes for interfaith couples prior to their marriage. Father stated that after taking the classes about Judaism, there was nothing about the Jewish religious doctrine or tradition to which he objected besides the Jewish understanding of Jesus Christ. Father stated that he believed that the Jewish belief was that Jesus was "just a prophet" and not the son of God and that he believed that Jesus was indeed the son of God. However, father expressed that he did not believe that this difference was significant in regard to their marriage or his agreement to raise the children in the Jewish faith. Father acknowledged that at the time of his agreement to marry mother he did not expect to teach his children his understanding of Jesus and that it was not important for him to ensure that his children had any specific religious identity besides Judaism. However, father stated that he was "attracted" to Jewish culture. He stated that he "liked the sense of family and cohesion that the Jewish people seem to have . . . it's a cultural thing . . . It was an ethnic identity . . . the sense of ethnic identity . . . it was beyond religious beliefs . . it was like being Spanish or something . . . it was a cultural identity." However, he added that he did not like the "sense that there was an insider/outsider line."

They were married in April 1988 in Belmont, MA. The couple was married by Rabbi Kaminsky in what both

describe as a Jewish ceremony. The ceremony was characterized by Jewish traditions such as being married under a ceremonial canopy, father's wearing of a head covering, and various Jewish prayers. Father and mother were 27 and 26 year old respectively at the time of their wedding.

Their first child, Ariel (Ari) was born in October 1988. To name the child, mother and father read several books including a book of Hebrew names. Both mother and father developed independent lists of potential names. The name Ariel was included on both parent's list and was chosen. Father states that mother had a preference for choosing a Jewish name and that he chose Ariel with the understanding that it was a Hebrew name that means lion of God. Ari was circumcised after his birth in a traditional Jewish ceremony attended by friends and family. Ari also had a ceremony several weeks after his birth called a Pidyon Haben. Mother described this as a Jewish ceremony in which the first born male child is "symbolically brought back from God for exchange of the silver."

After their marriage the couple lived in Belmont, MA. Father stated he attended Jewish High Holiday services with mother before Ari was born. Father reports that mother continued to attend Jewish services during the High Holidays after Ari's birth but did not attend weekly Sabbath services regularly. He stated that during the first 3 years of their marriage he attend Jewish Sabbath services with mother on two occasions and regularly attended the High Holiday services with her. These services were attended at a Synagogue affiliated with the Reform movement of Judaism. Mother stated that she and father observed the Sabbath from the beginning of their

marriage by having a traditional Sabbath evening meal with Jewish prayers on Friday evenings. She believes that between 1989 and 1990 the family typically observed the Sabbath by reciting traditional Hebrew prayers for wine, bread and light on the average of 7 out of 8 weeks. In contrast, father reports that before 1991 he and mother "never" celebrated the Jewish Sabbath by completing ceremonial prayers. However, when questioned further, father stated "it may have happened but I don't remember." Further, father subsequently contradicted this report when he stated, that "Sabbath celebration became a weekly ritual when we moved to Sharon." Father stated that between 1992 and his separation in 1994 he and mother completed the traditional Jewish Sabbath rituals of saying Hebrew prayers for wine, bread, and light on average 2 to 3 times per month. The children were typically present for these rituals. Mother stated that because father had a better ear for music, he typically led the reciting of the Jewish prayers. Mother reports that she purchased challah, traditional Jewish bread, nearly every week during the year preceding their move to Sharon. Father independently reported that he knows the Hebrew prayers for the wine, bread and light and sang them regularly with his family at Friday night dinners between 1992 and 1994.

At the end of August 1990 the couple was informed by their landlord that they had to move out of their apartment in approximately 2 months. They shopped together for homes and agreed upon the marital home in Sharon, MA.

In September 1990 mother and father were shopping in a mall when they met a man named Kent Brand in a

store. Father stated Mr. Brand "had a certain magic, a light in his eyes that is not common" and that he "admired his character." Mr. Brand invited the couple to his home for brunch and the couple attended. There was a religious pray at the meal but no attempt to discuss religion. Subsequently, father began to go jogging with Mr. Brand and the two began to discuss difficulties that father was having in his "life and jobs." According to father, Mr. Brand began to advise him with "about life" and suggested that he "look at the religion." Father began studying the Bible with Mr. Brand. Mr. Brand reportedly wanted father to be baptized immediately. Father was not prepared to make that commitment two weeks later when Mr. Brand moved to Georgia. However, father continued to study the Bible with members of Mr. Brand's church, The Boston Church of Christ.

Mother and father moved to Sharon, MA in November 1990. According to both parents the decision to move to Sharon was motivated primarily by affordability and mother's desire to live in a town in which she could become more involved with a Jewish synagogue and community. Father stated that he did not want to move to Sharon but agreed to the move. Mother contends that father never expressed his objection to moving to Sharon. Father made arrangements for members of The Boston Church of Christ to assist with the physical labor of moving to Sharon. Both mother and father were impressed by the experience in which approximately a dozen members of the church came to their home in Belmont and loaded their truck in an expedient and efficient manner and then another group from the South Shore met them in Sharon to unload their possessions.

Father continued to study with members of the Church after moving the Sharon and began attending church services. Mother joined a Reform Jewish congregation in Sharon because of their "strong outreach for interfaith couples." Mother and father began counseling with the Rabbi related to "interfaith issues." Three months latter the Rabbi at the Reform congregation, whom mother particularly liked, left the congregation. Because of the Rabbi's departure and the difficulty attending Sabbath services which were only held on Friday nights, mother joined a different congregation. The second congregation was affiliated with the Conservative Jewish movement. Mother reportedly began to attend Sabbath morning services on a regular basis after joining the Conservative synagogue. Mother stated that she always took all of her children with her when she attended religious services and that father never objected to this practice.

Mother began taking Jewish education classes. During those classes, mother met a woman who informed her about the Striar school, a school affiliated with the Orthodox Jewish movement. Mother went to see the school, discussed it with father, and enrolled Ari at the school. The school provides both Judaic and non-Judaic education. Ari attended pre-kindergarten and two years of kindergarten classes before beginning the first grade at the Striar school. Father did not object to the children's attending this school.

Moriah was born in May 1991 and Rebekah was born in April 1992. Both were given names purposely chosen for their Jewish significance.

In September 1992 Ari reportedly began to express his desire to attend the Orthodox synagogue because most of his friends from the Striar school attended services at the synagogue, according to mother. She agreed to bring Ari to that synagogue for Sabbath services. Mother subsequently began taking a course with the Orthodox Rabbi. Mother states that because of this course she found "a spiritual side of Judaism" that she had not known and developed her own desire to attend the Orthodox synagogue. Since that time mother and the children have regularly attended the Orthodox services and participated in the activities of the Orthodox congregation.

Mother and father portray significantly different perceptions of the marital conflict that led to their separation and divorce litigation. Father believes that problems in the marriage began after approximately one year of their marriage. He attributed the conflict to his perception that mother was having "a very difficult time making decisions and would hide from them by sleeping a lot and using illegal drugs." Father believes that mother struggles with "depression," which he characterized as periods in which she would have difficulty getting out of bed in the morning, eating, experienced low mood, and cried excessively. He provided no specific descriptions of how mother's behavior in this regard may have interfered with her ability to meet the children's physical or emotional needs and stated that her behavior never put the children in any "imminent risk" Father expressed that his primary concern about his perception of mother's struggle with depression is the "poor example it sets for

the children." Father denied ever observing any indication that mother might be experiencing suicidal ideation or behavior. Father wrote that "my hope is that the stress of trying to raise 3 children alone will wear on Barbara to the point of her ineffectiveness with nurturing the kids."

He also believed that his marital conflict was related to mother being "overly dependent on her parents." Father also believes that mother had difficulty coping with "any type of confrontation and she would seem to go blank and withdraw emotionally." He believes that the primary reasons for the divorce are mother's "infidelities with men and women," "her chemical dependencies," and her "difficulty emotionally separating from her family of origin." Both mother and father described experiences in which each was sexually involved with other adults during the course of their marriage. Both report sexual intimacies with the same women. The report of each individual is generally consistent with that of the other with regard to extra-marital affairs.

Mother believes that the difficulties in the marital relationship began in the Fall of 1990 when father joined The Boston Church of Christ and that the difficulties progressed over time. She believes that father's involvement in church activities "began to take over his life financially, logistically, and emotionally." She reported that father was spending 3 nights a week, half of each Sunday, and 3 to 4 hours a night doing church activities. She also believes that he began to "infringe on their premarital agreement about raising the children only Jewish, i.e., he wanted to take them to church." She believes that the primary reason for her seeking a divorce is her inability to tolerate father as a "Born Again Christian" who

believes she and her "children will burn in hell unless" they "accept Jesus as their savior." She believes that father's religious values and beliefs are "so incongruous" with what she believes and what she has taught her children that she can not live with "him, his church, and their doctrine." Mother is unable to tolerate the perception that father's religion requires him to "proselytize all non-believers (including and especially his family) and that all members of his family, including his wife be submissive to his will in all things."

Mother and father went to a bed and breakfast inn in Northern New England for a overnight trip on a Friday night in the spring of 1994 to celebrate their wedding anniversary. Without mother's knowing, father packed their Sabbath candles and Manashevitz wine so that they could celebrate the Sabbath. When asked about how the family celebrated the Jewish Sabbath, father independently reported that when his family traveled out of town, "I would brings things, she wouldn't do it, I would bring the candles, unknown to her . . I might have brought the stuff . . I observed these rituals because it made Barbara happy. It did not make me Jewish or make my family Jewish."

In August 1994 father and mother began to lead more "separate lives," including maintaining separate bedrooms. In September 1994 they agreed that father would move out of the marital home. Father believed that the separation was temporary and planned to reconcile. Mother filed for divorce several weeks later.

Since the time of the divorce the primary residence for the children has been the marital home where they

have lived with mother. A Temporary Order was issued on December 9, 1994 in which Judge Shaevel ordered that father may visit with the children every other weekend from Saturday at sundown until Sunday at 6:00 p.m. On August 15, 1995, Judge Shaevel ordered that father shall have the right to visit with the children every other weekend form Friday at 5:00 p.m. (or one hour before sundown if that more easily accommodates the mother's religious practices) to Sunday at 6:00 p.m. and that father shall have the right to bring the children to his church for services, but shall not have them attend any religious instruction. In addition, Judge Shaevel ordered that father not interfere with, undermine, or otherwise contradict the religious teachings or customs provided by mother's religion. On October 12, 1995 a Visitation Order was made by Judge Harms. This order mandated that father have visitation with the children every other weekend from one hour before sundown until Sunday at 6:00 p.m. That order also held that father have visitation every Wednesday evening for dinner form 5:00 p.m. to 7:00 p.m. On October 16, 1995 Judge Harms entered a Judgment in response to a Complaint for Contempt dated September 27, 1995. That Judgment was that father was not guilty of contempt but that he is prohibited from taking the children to any "Sunday School or bible classes whatsoever."

MOTHER

Mother came to each appointment on time and cooperated with all aspects of the investigation. Her physical appearance, hygiene and grooming were unremarkable. There was not behavorial indication of a clinical disorder of thought or mood. Mother displayed a full range of

appropriate affect during the interviews. Her primary affective state when discussing father was one characterized as angry.

Mother's anger toward father was evident when she was asked questions about him or their relationship. However it is noteworthy that when mother was asked questions about herself and her conduct, she appeared to have minimal difficulty focusing on herself and generally avoided attempts to refocus the conversation onto father's weaknesses. In contrast mother often went into great detail in describing negative aspects of herself. Her description of her difficulty sleeping and her tendency to "lose control" and yell at the children when she feels overwhelmed are examples of this observation. Mother often spoken positively of father's ability to nurture the children. Mother consistently reported her belief that her children love and her attached to their father and that she believes they would benefit from maintaining a significant relationship with him.

Mother was born and raised in Princeton, NJ. Her report of her childhood experience is unremarkable. She graduated from a private high school in 1981 and attended Tufts University form 1981-1985. Mother graduated from Tufts in 1985. From 1984 through 1987 she was employed as a neonatal care consultant. From 1987-1991 she provided part-time neonatal consultation services on a self-employed basis. She also worked from 1991-1992 for a financial services company. Since 1992 she has worked full-time as a homemaker. Mother's reported physical and mental health history is unremarkable. She denies ever being arrested for or convicted of any crimes.

She reports that she is not currently dating or involved in any romantic relationship.

Mother denies that she has experienced periods of significant depression. However, she acknowledges that she has had times in which she felt "overloaded" with the things she had to do. She acknowledged that these periods corresponded with a period in her life in which she was smoking "a lot of marijuana". However, mother denies that her distress at these time interfered with her ability to take care of the children. She believes hat she had difficulty completing paperwork related to family management. Mother also stated that when she is "over-tired" she is short on patience and tends to "react more strongly, verbally, than necessary." The last reported period in which she had trouble getting things done was in the spring of 1994. She reports still having days when she feels she has more to do than she can but does not believe it affects her ability to complete tasks or care for the children. Mother denies that she has ever experience difficulties with her appetite and has never lost or gain weight related to her mood and its affect on her appetite. Mother stated that she "definitely" has had difficulty sleeping in the past. She stated that after her first child was born sleeping became problematic for her. She stated that Ari nursed completely for the first six months and that she never knew when she would be able to sleep or when he would wake her up to nurse. She believes that the unpredictability of her sleep caused her significant distress and caused her feel that lost her "sense of control." Mother stated that she has never "been a morning person" and has had difficulty getting out of bed in the

morning throughout her life but that this difficulty was exacerbated following the births of her children. However, mother believes that she has never not been awake to prepare the children for school.

Mother denies having smoked marijuana since the summer of 1994. During that summer there was one incident in which she was camping with father and his cousins who had marijuana. She reports having stopped smoking marijuana before Rebekah was born and believes, besides this incident in 1994, she last smoked marijuana in the summer of 1993. Father denies any knowledge that mother has smoked marijuana since their separation. She reported that she and father often smoked marijuana together during their marriage. However, she indicated that father discontinued using marijuana approximately one year before she stopped. She denies that either she or father used other illicit drugs during their relationship.

Mother acknowledged that she spent many nights away from her house with the children between May and September 1995. She also acknowledged that there were several times when she and the children decided to stay elsewhere on the "spur of the moment." These "spur" decisions were reportedly always on Friday nights when she would spend the Sabbath at the home of a family who lived closer to her synagogue in Sharon. Because of her religious practice mother does not drive between sundown on Friday and sundown on Saturday. Staying with this family allowed her to share the holiday with her friends and for her children to spend the day with the children of the other family. It also decreased the distance that she and the children needed to walk to their religious

service on Saturday morning. Mother denies ever taking the children to any other location "on the spur of the moment."

During the same time period discussed immediately above, mother made several other trips with the children. She and the children spent eight days in New Jersey to celebrate the Jewish holiday Passover. There was an explicit court order allowing this trip. Mother also took the children to New Jersey for two weeks in the summer. She reported that she and the children have spent two weeks each summer in New Jersey since the birth of Ari. Each summer she and the children attend a "Jewish family camp" with the maternal grandmother and spend one week at the summer home of the maternal grandmother. Father has reportedly joined the family at the Jewish family camp on several occasions in the past. Mother reports that during the period in question she and the children attended a 3 day Jewish family retreat. However, she returned to her home a day early so that the children could visit with their father on the Monday after the weekend which was memorial day. However, mother stated that this was not a mandated visitation day for father. Mother reports having traveled to Connecticut with her children for a 2 night stay with another family. Mother reports that none of these out of stated trips were planned spontaneously.

With regard to discipline, mother believes that it is important to focus on positive reinforcement of good behavior and to set-up specific goal oriented systems to reinforce positive behavior. She also believes that their needs to be consequences for inappropriate behavior. By

consequences she is referring primarily to removing privileges. Another tool she uses is the "peace bench." The "peace bench" is a designated spot on which the children must sit quietly when they have behaved inappropriately. The children stay on the bench until they determine that they are ready to discuss and resolve the problem. She reports that she uses physical discipline only with younger children and that she does not need to use physical discipline when a child reaches the developmental stage at which they can understand the consequences of their behavior. Mother indicated that this typically happens when the child reaches two and half to three years of age. Mother reported that she does not use physical discipline with Moriah or Ari and uses it infrequently with Rebekah. She denies using physical discipline with Moriah in the past nine months and in several years with Ari. Rebekah receives physical consequences approximately once per month. When she uses physical discipline, she reports that it typically consists of a slap on the hand and is only one slap. She denies ever hitting the children on any part of their body besides their hands. Mother stated that she has never hit the children with any objects besides her own hand.

Psychological Testing:

Ms. Zeitler-Kendall completed the MMPI-2 as part of the current evaluation. The MMPI-2 is an empirically derived measure of current psychiatric functioning which also possesses validity scales allowing an assessment of the subject's approach to the test and the validity of her responses.

Ms. Zeitler-Kendall's responses suggest that she presented herself in a somewhat defensive manner, attempting to present herself free from problems and give the image of herself as extremely virtuous and free from weakness. Her apparent attempt to present herself favorably was within normal limits for an individual with her educational experience in the context of a custody evaluation. Her responses to the items loading on the validity scales suggest that her overall profile may be an underestimation of current difficulties but is generally considered a valid indication of her current functioning.

Ms. Zeitler-Kendall's overall response pattern does not suggest that she is currently experiencing psychiatric symptoms warranting a psychiatric diagnosis, including Major Depression. However, her pattern of responding provides data related to general personality and behavorial patterns. Ms. Zeitler-Kendall's responses are consistent with those of individuals who are less traditional in their gender-role identity and have interests that tend to be stereotypically more masculine than feminine. Her patterns of responses is consistent with behavioral observation and suggests that she in an individual who tends to be very socialized, responsible, extroverted, talkative, assertive, active, and may be somewhat dominating in relationships. These characteristics are consistent with behavorial observation in the course of this investigation. Although individuals with this response pattern tend to form relationships easily, their relationships tend to be superficial and insincere. Also, there is a tendency to be manipulative and opportunistic in relationships and these individuals may tend to seek out competitive relationships that often evoke resentment and hostility in

others. However, when provoked by others, individuals with this response pattern are prone to respond with overly aggressive behavior.

FATHER

It should be noted that father expressed his concern at the beginning of my evaluation that he perceived me as being of Jewish faith and that this might cause me to be biased in my investigation. I responded to father's inquiry regarding the impact of my heritage and personal beliefs on my investigation. I explained to him how my training prepares me to avoid bias, my commitment to avoiding bias, and steps that I would take to avoid potential bias. After the first interview I advised father that if he believed I would be unable to conduct the investigation without bias that he should inform me and that I would seek guidance from the court. I also advised him that if he believed I could not conduct the investigation without bias that he should not participate in the investigation at that moment and should motion the court to appoint a different GAL. At the second meeting father indicated that he wished to proceed with the investigation and was comfortable with my ability to conduct the investigation. On several occasions, father requested that I attend functions at his church so as to get a better understanding of his religion. Father did not provide me with a rationale for attending a church function that led me to believe that it was likely that I would collect relevant data distinct from data available from other sources. I informed father that my purpose was not to evaluate his religion and that I did not plan to attend a church function to evaluate his parenting capacity and

provide the Court with clinical information regarding the impact of various custody and visitation plans on his children.

Father came to each interview on time. There was nothing noteworthy regarding his appearance, grooming or hygiene. He was generally cooperative throughout the investigation. His primary affective state can be characterized as somber.

There were several occasions during the interview when father displayed difficulty focusing on himself and his conduct. Father often responded to questions about his own conduct with explanations of how mother is bad or responsible for the related difficulty or by portraying himself as the victim. One example of this dynamic was observed on the day before the submission of this report when father came to my office unexpectedly with the payment for the GAL retainer that mother asked him to deliver. On the prior day this GAL made two telephone calls to father's home requesting a return phone call which was never received. When father arrived at the office without an appointment he encountered this GAL in the hall and requested to meet with him to respond to the GAL's request for information and to make an inquiry regarding the GAL fees. The GAL was only able to allot 5 minutes to see father without an appointment. In response to his inquiry regarding GAL fees, he was informed that his questions and concerns were valid, but that the manner in which he was requesting this information was inappropriate. Father's voice immediately became louder and his tone appeared to be somewhat hostile as he attempted to blame mother for sending him to my office with the check. Another example of father's

difficulty assuming responsibility for his behavior was observed on the day the GAL's interim report was filed. Father was pro se at that time. Therefore, the GAL telephoned both father and mother's attorney to inform them of his intention to file the interim report and the content of that report. Although the report supported father's request for a continuance, it also attributed much of the delay in the completion of the GAL investigation to father's failure to comply with the demands of the investigation. Father responded to this data with a comment implying that he was being victimized. In addition, when discussing his extra-marital affair with a family friend, father attributed his behavior to an attempt to meet his wife's desires.

Several of father's concerns are described above. An additional concern that father has is that mother's religiosity is "its exclusion toward those outside their community and the message the children receive from that teaching." He added that his believes that his children are affected because "95% of their relationships are with Jewish individuals and "they are developing an us vs. them. mentality" in which he believes that is "in the them category." To support this claim, father reports that his children have told him that they are Jewish and he is not."

Another concern father has about mother's ability to care for the children is his belief that she is unable "to keep a tidy home." He is also concerned about "her inconsistencies in discipline, expectations, responsibilities, and standards for herself and children creates what seems to be an unstable or at least insecure household." As an example of this behavior father stated his

belief that from "mid-May to mid-Sept. 1995 Barbara was away with the kids over 40 days for vacation many times just spur of the moment decisions staying people homes, hotels, and group housing environments."

Father was born in Stoughton, MA and raised on Cape Cod. He graduate from a public high school in 1979 and attend Northeastern University from 1979 to 1984. Father received a B.S. in mechanical engineering.

Father was asked to provide a written report of all jobs that he held since graduating high school. My review of father's deposition responses indicates that he omitted jobs that he held in his report to me. The following is a description of his employment history based on both his report to this investigator and his deposition responses. After his graduation he worked for approximately one year as a salesman and technician for a solar products company. From 1985-1988 father was employed as a licensed real estate salesperson. In 1988 father reportedly worked for 3 months for A and S Security processing applications for homeowners loans. Father also worked briefly as a security guard. In 1988 father worked for a financial services company that sold life insurance and mutual funds. Father received licenses to sell life insurance and broker securities. He left that position due to "differences of management styles." In 1992 father worked "odd jobs" for six months before beginning a business in which he owned and operated vending machines. Father owned that business for approximately one year before selling it. Father was unemployed between November 1993 and February 1994 father was unemployed. In 1994 father was hired as a salesman for American Management Services. Inc. He was employed

there for nearly one year before being "fired or laid off." He held "odd jobs" between October 1994 and June 1995 including delivering phone books and working as a mason's apprentice. Since June 1995 father has worked part-time for the Vernon Company selling promotional products. He also works various temporary jobs.

Father's report is unremarkable with regard to physical and mental health. He denies any arrests of convictions as an adult but acknowledged that he arrested in 1977 for stealing a stereo from an automobile. Father denies that he currently uses marijuana or any other illicit substance. However he acknowledged regular marijuana with mother which his discontinued after his baptism in 1991. Father denies that he has dated since his separation or that he is currently involved in a romantic relationship.

Father was born to parents who identified themselves as Catholic and raised in the Catholic faith. He attended Catholic church and religious school regularly during his childhood. Father reports that he participated in most of the common Catholic ceremonies such as communion. However, he discontinued his religious practice when he attended college. Father reports that with regard to religion he was "feeling voids" at different times in his life. During college he investigated other religions, including eastern religions and "new-age" religions. However, he denies joining any church or formal religious organization until he joined the Boston Church of Christ. When he met mother, father was not affiliated with any religion or religious group.

His introduction to members of the Boston Church of Christ is described above. After moving to Sharon in 1990 father continued to study the Bible with members of the Boston Church of Christ. He stated that this was the first time he had ever read the Bible. As a result of this experience he began to understand how Jesus had called men to be disciples and that their purpose was to bring people back into a relationship with God. He stated that he began to "see the miracles that were being performed, healing the sick, bringing back the dead, and walking on waters." Father clarified that his perception of these activities was solely related to his reading of the Bible and that he had not actually observed these experiences in his life or in his church. As he studied the Bible more he came to the understanding the Old Testament was "a book of promises and prophecies of things to come and that the New Testament describes the fulfillment of those prophecies. He believed that the coincidences that he was reading were too great to just be coincidences and that the writers were actually witnessing the experiences. He believes that lack of written testimonies stating that the experiences did not actually happen is support for the validity of the writings. He stated that his understanding of the Bible "called" him to be very sacrificial and do many things that were against his human desires. He cited his previous tendency toward "fits of rage" and his willingness to engage in extra-marital sexual intimacies as behaviors he was called to sacrifice because they were sins. Father also described himself as "a very angry person" who would "fly off the handle" before he joined the church. However, he believes he is no longer this type of person. Father described himself as now being a "born-

again Christian" who was "baptized as a disciple of Jesus. "He stated they he belongs to a group called the Boston Church of Christ.

Father indicated that he believes that people who do not believe in Jesus Christ will go to "eternal punishment, the second death which is separate from God for eternity." He said that where people go who are damned to eternal punishment is described in the Bible and in his religious services as "a place where there will be weeping and gnashing of teeth." Father expressed his belief that if mother does not accept the Bible, as he has, that she will "go to hell." Father agrees that the services to which he has exposed his children have included teachings from which his children could imply that their mother is damned to go to hell where there will be "weeping and gnashing of teeth." He denies that the children's understanding in this regard could have any negative impact on their relationship with their mother.

Father believes that if his son Ari was asked what his religion is that he would say that he is Jewish. However, he added that Ari also tells him that Jesus is the son of God. Father believes that his children "have a warped perspective of who Jesus is." Father stated that if his children did not accept Jesus that he "would never stop trying to convert" them. He also stated that if he was successful in converting his children to Christianity that their mother would "do all sorts of viscous things to stop them from being Christian" and that his attempt "to convert them to Christianity will make them vulnerable to Barbara's viscous side."

Father expressed his belief that "the mother should submit to the father" and that "there is only one leader of the house and it is the father." Father stated that "when there is a real decision and there is a real impasse, she needs to trust that I know what I am doing, she needs to submit." He attributed these beliefs to emanating directly from his religious understanding.

Father reports that he uses various techniques in disciplining his children. He stated that he often uses "time-out" which he described as having them sit apart from the group. He stated that this is the most frequent disciplinary method he uses. Father reported that he also uses "spanking for lying and direct disobedience." Father indicated that he usually spanks the children with something other than his hand. For example, he usually uses a "spoon or spatula." Father also acknowledged that he has hit his son with a spackling knife. Further, father acknowledged in his deposition that he has hit Ari "with a backhand that knocked him off of the chair." Although he denies that he spanks them on most days they are with him, it is normal that one of the children will be spanked during the course of a weekend visit with him.

Father explained that one reason he hits the children with these objects is that "it was the way I was raised . . . " When I began to ask Mr. Kendall about the teachings of church with regard to child discipline, he interrupted me before I completed my question, raised the volume of his voice, and indicated his belief that his religion had no bearing on how he raised his children. His tone of voice was perceived as hostile during this interaction. However, when I asked my question subsequently, father replied "the Bible talks about using the

rod . . it talks about sparing the rod and spoiling the children . . . I think the kids need to be disciplined physically. Children should be spanked with something . . . They are not trying to hurt their kids. They are trying to change the behavior . . . " Mr. Kendall stated that "my primary function as a father is not to make my children happy . . . it is to raise my children the way I know they should be raised . . . in the long run it will make them happy.

Mr. Kendall was asked hypothetically what he would do if Ari said that he would not eat non-kosher food in his home. To this question father replied, "I can only go so far . . I would tell him that you'll have to bring your own . . . is the reality of it . . . He'll say things like that is not kosher . . I specifically tell him not to tell his mother so she wont get upset.

Father reported that there was an incident in which he "threatened to cut off Ari's Tzitzit (fringe on his clothing of religious significance). However, he stated that he said it "in jest" explaining that the child wanted to wear the fringe outside his shirt and that he stated "tuck them in or I'll cut them off." Father believes that his own behavior was "wrong."

Father also acknowledged that Ari at one time wore long sideburns (payes), as part of his religious practice and that he took action to have the hair removed. This action was taken with the knowledge that mother was opposed to cutting off the hair.

Mr. Kendall reported that from the time of his separation in 1994 until the court restricted him approximately one year later, he brought all 3 of his children to religious

education classes at his church each weekend he had physical custody. Father reported that mother objected to his bringing the children to religious classes. He informed me that he told her "I know you don't agree, but I'm taking them anyway." He stated that there was an incident in which Ari became upset at the religious school and "had a tif with someone about wearing a yamika or his side burns or a tzitzit . . . someone made fun of him and they got into a fight . . . he would wear his tzitzit and yamika to church." Father then stated that "what Ari reported is that they hate me because I am Jewish." Father laughed while making this statement and indicated that he did not believe Ari's report and believes that perception of the incident is distorted and is evidence that "he has already taken on the minority status."

Father spontaneously stated that "I find it most damaging that Barbara sets it up that dad is not Jewish and he is different." However father denies that he has ever observed mother saying anything or implying anything that father is bad because he is different. He stated that he was "never heard her say that daddy isn't as good as we are . . . but I know that she thinks they are."

Psychological Testing:

Mr. Kendall completed the MMPI-2 as a part of the current evaluation. The MMPI-2 is an empirically derived measure of current psychiatric functioning which also possesses validity scales allowing an assessment of the subject's approach to the test and the validity of his responses.

Mr. Kendall's responses to validity scales are basically within normal limits and suggest that although

he may be putting forth some effort to minimize problems, he basically provided accurate responses. His MMPI-2 profile is considered a valid representation of his current psychiatric and psychological functioning.

Mr. Kendall's responses to items loading on the clinical scales suggest that he is not currently experiencing any major psychiatric disorder. However, his responses provide data related to his general personality and behavioral functioning. Persons who responded to MMPI-2 items in manner similar to Mr. Kendall tend to be rather immature and narcissistic. They tend to me more emotionally passive then their peers and harbor very strong, but unrecognized, needs to be taken care of by others. Individuals with this profile are not likely to act out in obviously delinquent ways. However, they tend to have a low frustration tolerance and harbor intense feelings of anger and resentment. This combination makes these individuals prone to brief periods of aggressive acting out.

Although Mr. Kendall does not appear to currently be experiencing symptoms of anxiety or depression indicative of a psychiatric diagnosis, he endorsed several items suggesting he is experiencing significant thoughts associated with depressive and suicidal ideation. He indicated that his daily life is not full of things that keep him interested; he has had periods of days, weeks, or months when he could not take care of things because he could not "get going;" believes that he is not as good as other people; lacks confidence; and has sometimes felt that difficulties were piling up so high that he could not overcome them.

ARIEL (Ari)

Ari was brought to my office by his mother. His physical appearance, height, and grooming were unremarkable. He wore a head covering (Yamika), a traditional Jewish ritual. Ari was generally polite and cooperative throughout the interview. Ari reported that neither parent instructed him to tell me anything in particular or to withhold any information from me. He also indicated that he believed he could be honest with me and that if there was something he did not want to tell me he would say so and not be dishonest.

Ari was asked to draw a picture of his family. Initially, he was resistant to completing this task and expressed that he did not like his family. Although he was not given any instruction on who to include in his drawing, he stated that he wished he did not have to draw each individual in his drawing. His family drawing was age appropriate for form and visual-motor integration. He drew each individual in his family separately with no indication of interaction. Each individual was drawn in a manner in which they appeared happy. Given his statements about not liking his family and his discomfort with this task, the happy portrayal of each family member is suggestive of the attempt to deny the changes and distress typically associated with parental separation and divorce. This type of denial, should it not persist excessively, is a commonly observed early reaction in children's process of grieving with the losses related to divorce. Ari's drawing was unique in that each individual was drawn without feet. This feature may be interpreted as an indication that Ari perceives his family as being

unable to move forward from the situation they are currently in.

The child's reported belief is that his parents separated because they "disagree." He added that "my dad says that my mom yells too much . . . I don't think so." Ari indicated that the primary things that his parent disagree about are his religion and his name. He stated "I want Arthur, my dad want's Ben, my mom wants Arthur." He informed me that the choice of a name is related to his being Bar Mitvahed and added "When you turn 13 and you become an adult all Jewish people have a Bar Mitvah."

Ari was asked what his religion was. He replied "mom wants Jewish, dad wants Christian, they celebrate different things, I haven't decided." However he spontaneous added "I don't believe Jesus is lord. I believe God is lord . . . I want a Bar Mitzvah." Ari indicated that he covers his head "to remember God above me." He spontaneously stated "I don't like to go to church . . I don't get to run around . . . You have to listen for two hours . . . I like to go to synagogue . . . you get to go outside . . There is a man who gives candy, called a Nassen . . . There are kids services . . . I am going to learn from the Nassen . . . learn to read Hebrew . . . I like Hebrew." When asked what religion his sisters were Ari replied "we are all Jewish because we are from a Jewish mother . . Your mother gives you your soul and religion comes from the soul."

Ari reported that his mother and father "fight every time they see each other." He was unable to state the

content of their conflict adding "they do it privately, but I hear them yelling."

Ari informed me that he would like to speak to the Judge. I told him that he could tell me what he wants the Judge to know and that I would provide the Judge with that information. Thus when asked what he wanted the Judge to know he responded with the following statements:

> "I want him to know that it's not fair, I have to do the stuff I'm not supposed to on Shabbas and I think it would be fair if I could do it on other occasions, on other days so we could do it so I don't have to not follow the Sabbath and I want to know if you could discuss that with my parents and let them know if this would be OK and I don't like not celebrating the Sabbath appropriately."

Ari was then asked how he would like things to change to which he replied:

> Well I would like them to change and I'd like it to go that I can do with my dad on other days *not* (italics reflects the child's emphasis) the Sabbath.

Ari indicated that he believes that his father is aware of his desire to celebrate the Sabbath according to his Jewish beliefs. He stated that his father is aware of his desires because "I told him that I want to celebrate the Sabbath and not do stuff that I'm not supposed to do." Ari reported that his father's response to this expression was "we'll discuss that with the lawyers."

MORIAH

Moriah was brought to my office by her mother. Her physical appearance, grooming, and hygiene were unremarkable. Moriah was generally cooperative with the interview and established rapport easily and in a developmentally appropriate manner. She appeared to be within normal limits with regard to physical, motor, language, and cognitive development.

Upon entering my office, Moriah approached a doll house, began playing with the dolls, and stated "I don't like my family." Efforts to understand the basis for this statement were unfruitful as the child was unable or unwilling to expand. However, Moriah picked up the adult female doll and acted out a scene in which the adult scolded the children in a hostile manner stating "you don't do that without asking your mother."

Moriah was asked to draw a picture of her family. She stated that she only wanted to have two family members in each drawing. She proceeded to draw four separate pictures, each depicting herself with each other family member. Each individual was depicted with a happy or benign facial expression. The pictures were otherwise unremarkable.

Moriah indicated that nobody had told her what to tell me or that she should withhold any information from me. However, she stated that she did not want to discuss her parent's divorce. She indicated an understanding of what divorce means and attributed her parents separation to "my momma and poppa don't agree on things." She was unable to be more specific regarding what her parents disagree about but stated that there were "too

many." Moriah then began to play with several other dolls and toys including a play doctor kit. She placed a toy stethoscope on a doll. I asked her to help understand the doll whose parents were getting a divorce. She stated that the doll felt "sad" about the divorce but added "I'm not talking about it anymore."

She described her visits with her father as being pleasant and indicated that she likes to visit with her father. However, she complained that he "bosses us on things."

Moriah initially indicated that she did not understand what "religion" meant. However, she spontaneously added "I'm not Christian. I'm Jewish. Mom is Jewish, My dad is Christian. My brother is Jewish and my sister is Jewish." Her statement was said in a matter-of-fact manner. There was no indication of any judgment or distress regarding her perception of their being a difference between herself and her father with regard to religious identification.

REBEKAH

Rebekah was brought to my office by her mother. Her physical appearance, grooming and hygiene were unremarkable. Observation did not suggest any delay in various aspects of her development relative to expectation for a child her age. Rebekah did not appear to have a well-developed understanding of her family's circumstances and was not able to provide this investigator with relevant data.

PARENT/CHILD OBSERVATIONS – HOME VISITS

All three children were observed with each parent individually in the home of the respective parent. The examiner first visited mother's home. The home is a two story contemporary home in which each child has their own bedroom. The home appeared generally clean. There were some areas of the home that appeared somewhat disorganized and not well maintained. The home was replete with age appropriate toys, games, and books for the children.

During my visit in the home Ari sought to command my attention and became aggressive with Moriah. At these times mother intervened. Her interventions were consistently one in which she calmly sought and obtained the child's attention, described the prohibited behavior, and explained the reason for the prohibition in terms of how the behavior could negatively impact his siblings and himself. Mother attempted to promote the child's understanding of his sister's feelings regarding his behavior toward her. Another example of this style was when Ari became excited about an icecle handling outside the living room window and wanted to open the window to take the icecle off of the roof and bring it in. The child began to open the window, mother firmly stated not to and explained that to removed the icecle properly and safely would take time and that they could do it after this GAL has left. Ari initially responded by persisting in his efforts and complaining about the prohibition. Mother then firmly but gently grabbed the child's hand and prevented him from opening the window. She then explained to the child that she had already told him why he could not get the icecle now, that he would have

to wait, and asked him if he need to go to the "peace bench" to think about what she had said. The child replied that he did not need to go to the "peace bench," discontinued his efforts to open the window and engaged himself in an apparently pleasant task without further complaint.

During my visit each child appeared to be enjoying themselves. Each of them engaged mother in various play tasks and sought assistance and guidance from her frequently. Each of the children were observed seeking physical affection from mother and responding to her verbal and non-verbal communication.

When this examiner arrived at father's home, he and the 3 children were just arriving from a shopping trip. They entered the house immediately before the investigator. Father's home is a three bedroom apartment that he shares with two adult men. There is a fourth room that father uses as his office. Father described his roommates as friends who met through his church. Neither was home during my visit. The home was generally neat and well kept with the exception of father's office that appeared cluttered and relatively unorganized. There is one bedroom for father. The children and father share the one bedroom during their visits. Although somewhat crowded, there is appropriate sleeping furniture for each of the children.

During my visit each of the child appeared generally content. Ari and Moriah were generally engaged with new toys they had received for Christmas. Ari was playing with a remote control car and attempted to command

the GAL's attention for his efforts. When he needed assistance with the toy he initially sought it from this GAL. However, when the GAL redirected him to his father he sought and received the assistance from him. During my visit Moriah attempt to engage with Ari while he showed me how his new car operated. However Ari resisted his sister's efforts and became aggressive toward her. Father responded to this conduct by instructing Ari to stop. The child subsequently became aggressive toward his sister again. Father reiterated his command for Ari to treat his sister differently and instructed Ari that he had already told him once to discontinue his aggressive behavior. There was no apparent attempt to help the child understand why his behavior was problematic.

During my visit all three children appeared generally content and comfortable. Each was observed seeking physical affection from their father. The children's play was generally independent and few attempts to engage father in their play or seek guidance from him were observed. Rather, Moriah was observed taking responsibility for her younger sister's need to nap. She spontaeous asserted her belief that the child needed to nap, prepared her nap area, and instructed the child to nap without engaging father.

PSYCHOLOGICAL TESTING OF CHILDREN

Both mother and father completed the Child Behavior Checklist (CBCL) for each of the three children. The CBCL is a standardized and developmentally normed parent report measure of child adjustment in several

domains of childhood behavior and psychological functioning. According to both Mr. and Mrs. Kendall's report on the Child Behavior Checklist (CBCL), all three children are functioning well within the average range of adjustment. They do not note any problems indicative of clinically significant disorder. The only concern, reported by both parents, is that Moriah masturbates frequently.

COLLATERAL CONTACTS

Educational Personnel:

The children's current teachers were contacted by telephone. Prior to the conversation, they were informed that the information they provided was not confidential and would be used in a report for the court that Mr. and Mrs. Kendall would possibly read.

Ms. Susan Butler has been Ari's first grade teacher since September 1995. She reported that has observed changes in him since the beginning of the school year and most notably in the past 6 weeks. She believes that Ari has more difficulty sustaining attention, displays more motor restlessness, and is using regressive speech (i.e., "baby talk") more than had been previously observed. Ms. Butler stated that Ari tends to talk about his family in a "matter-of-fact" manner and does not appear to her to be distressed about his family. Ms. Butler has had frequent contact with mother and infrequent contact with father. It is her opinion that both mother and father love Ari very much and try to do what is in their best interest.

Ms. Anne Sendor has been Ari's teacher for Judaic studies for three years. Ms. Sendor is also the rabbi's wife

and therefore knows Ari through religious activities outside of school. She reported that Ari is very bright, but that his school functioning has deteriorated significantly within the last several months. Whereas in the past, he was enthusiastic about Judaic studies, he now seems distracted and uninterested. She reported that he does not engage with the material in the deep and insightful way that he used to. He is "moody" and constantly concerned with issues of fairness. He is well-liked by the other children, but he does not have a close friend. Ari does not discuss his family situation at school. Ms. Sendor reported that she has had limited contact with Mr. Kendall (parent-teacher meetings and several phone conversations) and regular contact with Ms. Kendall. She reported that she has felt that Mr. Kendall is critical of her teaching and looking for her to make mistakes, sometimes taking things out of context. For example, he was upset that she taught the children about the holocaust. She reported that Mrs. Kendall has tried hard to support her children's love for their father. She noted that Mrs. Kendall does well with discipline and believes that she "runs a loving home."

Ms. Nancy Sidman is Moriah's primary teacher. She knew Moriah minimally last year (brief contact one time per week) and has been her teacher four days each week from 8:30 until 12:30 since August. She described Moriah as developmentally on target in terms of her academic, motor, and language skills. All the children reportedly like Moriah and want to be her friend. Moriah appears happy most of the time and participates well. Ms. Sidman reported that Moriah is sometimes unhappy when things do not go her way, but this is believed to be within the

range of normal four year old behavior. Moriah seems to adore her brother and sometimes talks about her family, stating "When I'm with my mother, I miss my father, and when I'm with my father, I miss my mother." Ms. Sidman does not have any concerns about Moriah. Ms. Sidman has frequent contact with Mrs. Kendall and minimal contact with Mr. Kendall. Mr. Kendall has expressed an interest in receiving correspondence from the school. She stated that both parents seem to be loving and concerned parents. Neither parents said anything negative about the other at parent-teacher conferences.

Ms. Lily Snow is also Moriah's teachers. She has known Moriah since August and is with her four days each week from 8:30 until 12:30. She reported that Moriah does well at school with the exception of having difficulty settling into a structured activity such as circle time. Moriah has many friends. Moriah talks about her family sometimes at school. She has mentioned that her father is Christian and that her parents really like each other and that "maybe they will all go to Disneyland together." Ms. Snow also quoted Moriah as saying "When I am with my mother, I miss my father, and when I am with my father, I miss my mother." Ms. Snow also reported that she has frequent contact with Ms. Kendall and only limited contact with Mr. Kendall. She noted that both Mr. and Mrs. Kendall seem to care about Moriah, and Moriah seems happy to see both of them.

Ms. Karen Glaun is Rebekah's teacher. Ms. Glaun has known Rebekah since September and sees her three mornings each week. She described Rebekah as happy, friendly, and well-adjusted. She believes that Rebekah is developmentally on track in every respect. Ms. Glaun

knows Mrs. Kendall well and Mr. Kendall minimally. She stated that Mr. Kendall seems to be a nice and friendly man, and she described Mrs. Kendall as a wonderful, gentle, loving, and caring mother.

IMPRESSIONS

It appears that both parents genuinely love their children and are available to them for significant relationships. It also appears that both parents are conducting themselves in a manner in which they believe serves their children's best interests. However, what they value as most important for their children is often so diametrical that the are unable to work cooperatively on behalf of the children to make important decisions regarding the children's development and shield them from their conflict.

It appears that in the past the parents were able to work together cooperatively to make decisions regarding child rearing. The data suggest that prior to father's religious conversion, the parental decision making was characterized mother having the primary responsibility for making major decisions regarding child rearing (i.e., religious, educational, and health care) and that father rarely objected overtly or tended to acquiesce to mother's wishes. Father's beliefs and behavior regarding parental decision making have apparently changed significantly over the course of the marital relationship. Father now believes that his role as father makes him the ultimate decision maker for his family and that mother, by virtue of her gender, should be submissive to him and his authority. Father directly attributes his changes in his beliefs and behavior to his new religious beliefs. The

radical difference between mother and father's opinions regarding whether the woman should always be submissive to the man in all decision making is likely to preclude these parents from working cooperatively to make effective agreements regarding the children. This difficulty is exacerbated by mother's personality tendency to be dominating and competitive in relationships and her vulnerability to respond aggressively when provoked as well as father's intense anger and hostility and low frustration tolerance that also make him vulnerable to act out aggressively for brief periods. Therefore, a custody plan that requires them to work jointly to make decisions is likely to result in excessive and persistent hostility and conflict to which the children are likely to be exposed. Social science research indicates that the overall adjustment and functioning tends to be related to and negatively affected by excessive parental conflict and hostility both before and after a divorce.

Mother's care for the home is not characterized by high degrees of organization or neatness. It does appear that father concern that mother has difficulty keeping "a tidy home" may be a valid one. However, there is no data suggesting that this characteristic creates any danger for the children or that it is likely to have any significantly negative impact of the development of the children. Its greatest impact may be on the children's own "tidiness" as the grow up. This concern is likely to reflect a difference in values between mother and father.

The data do not support the conclusion that mother has inconsistencies in discipline, expectations, responsibilities, and standards for herself and children that create any abnormally unstable or insecure household.

Mother's ability to understand and respond to the children's basic and emotional needs appears to be generally within normal limits. Mother does tend to be prone to becoming emotionally overwhelmed and responding in a verbally hostile manner. The relative impact of other aspects of her personality are discussed below.

Although she is prone to losing her temper and regressing to yelling at people when feeling overwhelmed, it does not appear that this is her typical mode of interacting with her children. Mother's parenting and disciplinary style is most consistent with one that social scientists have termed *Authoritative.* This style is one that is strict but one in which the parent understands the children's personality characteristics, points of view, interests and motives, and communicate well with the children, encouraging frank discussions of parental decisions. This style is in one in which she tends to be controlling and demanding of mature behavior and guides their activities consistently. It appears that she tends to respect the children's independence and opinions but generally holds firm in her positions, providing clear reasons for them.

Father's parenting and disciplinary style is most consistent with one that social scientists have termed *authoritarian.* This style is one that is strict, but emphasizes unquestioning obedience and respect for authority. Although he often talks *to* his children about his beliefs about right and wrong behavior, he discourages verbal give-and-take and tends not to use the consequences of behavior in one's lifetimes as the basis for his views of right and wrong. It appears that he tends not to ask and attend to his children's opinions and feelings in making

child rearing decisions. His parenting style is characterized by a relatively high tendency to control his children's behavior, use power freely, and attempt to instill conventional values such as respect for authority, and order.

Extensive social science research indicates that children of parents who tend to employ a more *authoritarian* parenting style tend to be less able to understand their children's personality characteristics, points of view, interests, and motives than parents who employ a more *authoritative* style. Longitudinal research has demonstrated that daughters of authoritarian parents are more likely to develop lower levels of social competence than daughters of parents with other parenting styles. Compared with girls from authoritarian homes, daughters of authoritative parents were more independent, purposive, and dominant. Likewise, sons of *authoritarian* parents tend to be domineering but deficient in leadership skills and lacking social competence. Boys in *authoritative* families showed more social responsibility and friendly, cooperative behavior, whereas those with *authoritarian* parents were more hostile and resistant. Research has also demonstrated that children of *authoritarian* parents tend to achieve less academically and have less motivation to achieve.

The data reviewed herein suggest that mother is likely to be better able to support the children's relationship with the non-custodial parent that is father.

Father has expressed his concern that mother has "lesbian tendencies" and that they may have some "psycho/sexual" reprecussions on the children. There is

psychological testing data indicating that mother maintains a gender-role identify that is less traditional and she reports having had sexually intimate homosexual experiences. However, mother maintains that her primary sexual identity is heterosexual. Whether her identify is primarily heterosexual, homosexual or bi-sexual, there is no apparent data indicating that her sexual identity or behavior have or will have a directly detrimental affect on the children's adjustment and development. The studies that are available suggest that children of homosexual single parents are no more likely to be significantly disturbed than children of heterosexual single parents and that their sex-role development, as measured by the nature of their play, is likely to be considered normal. Thus it does not appear that mother's sex-role identity has or is likely to have a directly negative impact on the parent-child relationships or the children's well-being.

Father contends that mother struggles with "bouts of depression." However, there has been no data indicating that mother has experienced significant major depressive episodes or that mother's mood has significantly limited her ability to care for her children. Further, current psychological testing in not consistent with the conclusion that mother is currently struggling with a depressive illness. However, it does appear that mother has experienced periods of feeling overwhelmed in which her motivation and energy level were limited. It is likely these periods were significantly affected by her marijuana use. There is no data that mother has used marijuana in the past year or that marijuana use is currently limiting her ability to care for the children. However, mother

discontinued using marijuana subsequent to a pregnancy and in the context of ongoing litigation related to parenting. It is possible that mother might return to using marijuana and do so in a manner that negatively impacts her mood and energy level. Such a situation, should it exist, might negatively impact her ability to respond to the emotional and physical needs of the children.

It appears that father's beliefs are such that he consciously chooses to expose his children to religious experiences and practices that he knows may have detrimental affects on them while they are alive. For example, although he believes that the content of his church services are "not appropriate for children until they are 12 or 13" he has chosen to take the children to these services because the Court restricted his ability to educate the children in his religious beliefs but did not restrict his ability to take the children to church services. It appears that father's choices in this regard are motivated by his belief that there is nothing more important for his children than accepting the doctrine and practice of his church and that should they not accept it they will go to "eternal punishment, the second death, separate from God for eternity, described as a place where there will be weeping and gnashing of teeth." Thus, it appears that father is willing to behave in ways that he knows are detrimental to the children during their lives if it protects them from what he believes they will face after their death.

Whether their is an afterlife, and how one's beliefs and behaviors affect their experience in such a place, is an issue that is addressed by various religions in different manners. Social science is unable to assess the validity of

beliefs of any religion with regard to the experience of life after death. However, social science does provide significant data regarding the experience of emotional pain and factors that affect a child's adjustment and development during one's life. The impressions of this investigator are based on what is known, and what can be reasonable inferred, about the impact of experiences on child development while they are living.

It is important to note that this investigator believes that neither religion per se is better or worse for the child. Further, it is my belief that under the same circumstances, father there is a way for father to share his religious experience, and identity with his children in a manner that might not have the potentially negative impact articulated herein. However, data reviewed during this investigation suggests that father often is either unable or unwilling to behave in a way that limits the potentially negative impact of his behavior toward them.

It does not appear that Ari currently experiences behavioral and psychological symptoms that meet criteria for a formal psychiatric diagnosis. However, his report suggests that he is emotionally distressed by the conflict between his strong desire for affection and approval from his father and his desire to maintain his Jewish religious practice. Further the reports of Ari's teachers suggests that there has been a decline in his motivation and academic performance recently, presumably subsequent to the exacerbation in parental conflict. Likewise, data regarding various aspects of Rebekah and Moriah's development are unremarkable and suggest there current functioning is within normal limits. However, there is

data indicating that Moriah is experiencing emotional distress related to the parental conflict and separation.

It appears that mother and father had an explicit premarital agreement to raise the children in a manner consistent with the doctrine and ethnic culture of the Jewish religion. There appears to have been an explicit agreement that the children would be raised solely in the tradition of the Jewish religion and culture. As a result of this agreement, the children have been reared in a manner in which their Jewish identity has been consistently fostered. Both mother and father behaved in ways that promoted Jewish religious belief and ethnic and cultural identity up to the time immediately preceding the marital separation. The sequencing of events indicates that father has significantly increased his efforts to promote the children's non-Jewish identity secondary to the separation.

It appears that mother religious, ethnic and cultural identity has been one of being Jewish consistently throughout her life. The data indicate that changes in mother's religiosity has been an ongoing process that began long before the marriage and continued throughout the marital relationship. Mother's affiliation with the Orthodox Jewish congregation does not appear to be a direct response to father's involvement with the Boston Church of Christ. The data suggest that mother supported father's Bible study and did not object to his conversion per se. Rather, mother's affiliation with the Orthodox Jewish congregation appears to be a further development in her long and ongoing search for spirituality, belonging to a greater social network, and the meaning of her Jewish ethnicity for her and her children.

This is not to say that her self-examination regarding her Jewish identify was not affected by her husband's increasing religiosity. It is likely that mother's increased religiosity was stimulated by father's exploration of his own religious identity and his development of an affiliation with the Boston Church of Christ. However, that data do not support the conclusion that mother's increased religious practice was an attempt to damage her children's relationship with their father. Further, the children's exposure to and education within the Orthodox Jewish community predates the marital separation and was not overly objected to by father. In addition, although the religious practice differs significantly between the various Jewish movements (Reform, Conservative, and Orthodox) the differences in the cultural and ethnic identities are fundamentally similar. However, it is clear that mother's religious practice has changed significantly over the course of the marriage. The best conclusion is that although her religious identity may have been influenced by her husbands conversion, and she may have become more observant in her religious practice, the process by which she moved in this direction appears to have predated father's conversion and the separation. It is most likely that both parents were effected by the other's changes in religious identity in a manner that led them to examine their religious identity. This examination may have supported mother's process of developing a more active connection with Judaism and father's conversion to Christianity.

Given the strength of her convictions, life-long consistency, the genetic connection, it seems unlikely that mother's basic religious and ethnic identity will change

during her life. This is not to say that her religious practice will not vary. In contrast, history and psychological testing indicate that father's overall self-identity is not well developed and that he tends to form impulsive affiliations that are passionate initially but tend not to last overtime. This pattern is observed in his religious, occupational, and interpersonal pursuits. Given this pattern of behavior, it is possible that father's association with the Boston Church of Christ might not last throughout his lifetime.

When asked what his religion was Ari initially responded by articulating what each of his parents wanted and then stated that he was undecided. However, his spontaneous statements were consistently associated with Jewish belief and his desire to be exposed to Jewish teaching and tradition and to avoid Christian experiences. He clearly identified himself and his siblings as being Jewish and provided a rationale based on Jewish law for his belief that he Jewish. The composite of Ari's responses regarding religion suggest that although he appears to have developed a formal identity of himself as being Jewish he may experience choosing a religion as choosing between his parents, a task that is likely to cause him significant emotional distress.

He appears to define his religious identity with regard to belonging to a Jewish family, as part of a Jewish social network, and appears to maintain of system of personal behavior and beliefs associated with Jewish culture and formal theology. The development of ethnic and religious identity, like most other elements of children's cognitive development, is a sequential process in which the child's identity develops in a progressive manner.

Ari's behavior in which he ascribes his Jewish identity to Jewish law and theology in indicative of his attainment of a formal self-identification of himself as a Jew.

As father believes, Moriah also appears to have developed a concept of herself as being Jewish. Consistent with her cognitive development, Moriah's Jewish identity appears to be determined on the basis of her being related to her mother and brother and belonging to a family unit she perceives as being similar by characteristics she perceives as related to being Jewish. It does not appear that she has reached the same formal level that her brother has in which he cites Jewish law as the basis for his Jewish identity.

Rebekah's age and cognitive development preclude a good understanding of her religious identity. It is likely that her identity in this regard is not well-formed. However, it is clear that she has been consistently exposed to Jewish culture and ethnicity throughout her life. If she continues to live primarily with her mother and siblings she is likely to develop a primarily Jewish identity by virtue of her sense of belonging to a primary family unit that maintains a Jewish identity and behaves in accord with the beliefs and culture of the Jewish ethnic culture and religious practice. Given that the parents' are not contesting that mother will remain the primary custodial parent and lack of apparent reason to recommend a change in the primary custodial parent, it is likely that Rebekah will be raised in the home with her mother and siblings. Thus, anything that serves to promote her identity as fundamentally different from that of her mother

and siblings is likely to promote a sense not belonging in her own home and may negatively impact her attachment with her mother.

Ari's formally developed Jewish self-identity has significant implications for his post-divorce parent-child relationships. Ari cites Jewish laws as the basis for his Jewish identity. He has a well developed and articulated belief that he is Jewish because his birth mother is Jewish and that Jewish law defines a child's religion as that of their birth mother. This belief system is one in which Ari can perceive himself as Jewish and his father as different without necessarily perceiving his father negatively. In Ari's mind his father need not be Jewish to be acceptable as a good and loving father. Thus, from Ari's perspective, it is conceivable that he could be an Orthodox Jew and maintain a positive and loving relationship with his father who is a Born Again Christian. Ari's current belief system appears to allow him to accept his father without needing to change him. If Rebekah and Moriah develop similar concepts the same is likely to hold true for them.

However, should the children come to accept the religious beliefs that father reports he wants them to accept, are likely to come to view their mother negatively and as person who will be punished for her sins. Accepting father's beliefs is likely to have a negative impact on their relationship with their mother. Should they come to view her negatively as a sinner whose lifestyle is morally wrong and worthy of eternal damnation, they are logically likely to have difficulty accepting guidance and nurturance from her. As they grow older, they would be likely to develop a strong need to convert their mother to

Christianity. Given mother's well-developed and consistent Jewish identity, and the failure of father's efforts to convert her, it is unlikely that the children would be any more successful in converting their mother. A more likely scenario is that their relationship with mother would mimic the relationship between mother and father now. This situation might be characterized by significant hostility between them and their mother and alienation in their relationship.

In addition, should the children reject their Jewish identity, and or accept their father's belief system, they are vulnerable to experiencing hostility from their mother, becoming alienated in their relationship with her as discussed above. In this case, the children are vulnerable to ultimately resenting father for promoting the disintegration of their relationship with their mother. Thus, their relationship with both parents might be damaged and the children may come to have a generally positive and supportive relationship with neither parent. In that social science research indicates that a child's ability to maintain at least one positive and supportive post-divorce relationship is critical for optimal post-divorce development, a plan that jeopardizes the children's relationship with both adults may be the worst case scenario.

Father is concerned that his children are "being taught" to be alienated from him because he is not Jewish. For example, he quoted the children as saying "you're not Jewish and we are." This quote, supports the notion that the children perceive themselves as Jewish and their father as different from them in his religious identity. However, this perception was likely formed as the result of children of an interfaith marriage being

raised in accordance with the traditions and beliefs of the mother. There is no other data from my observation, or the report of the children or collateral sources supporting the notion that anybody is teaching the children to judge their father negatively because of his religious identity. Apparently as a result of, at least in part, father's decisions and behavior, his children have developed or are developing concept of themselves as belonging to a religious and ethnic culture to which he does not belong. This reality does not preclude him from maintaining a nurturing and significant relationship with his children. However, it is likely that fathers attempts to change or prevent the development of their Jewish identity, thus implicitly denying it, is likely to cause the children emotional distress and thus foster alienation in the father-child relationships.

Father's beliefs about Jewish identity tend to be consistent with those of social science scholars in the understanding that Jewish identity is more than a set of religious beliefs. Rather Jewish identity tends be accepted as an *ethnic* identity. As father notes, being Jewish is akin to being Spanish or part of any other ethnic culture. Perceiving oneself as part of an *ethnic* group rather than just a *religious* group implies that one "conceives of themselves as alike by virtue of their common ancestry, real or fictitious, and who are so regard by others" (Shibutani & Kwan, 1965). Ethnicity is a sense of commonality transmitted over generations by the family and reinforced by the surrounding community. It is more than race, religion, or national and geographic origin. It involves conscious and unconscious processes that fulfill a deep psychological need for identity and historical continuity (Giordano

& Giordano, 1977). Ethnic identity patterns one's thinking, feeling and behavior in both obvious and subtle ways. It plays a major role in determining how one eats, works, relaxes, celebrates holidays, how one feels about life, death, and illness, etc.

The scholarly work and research of Klien (1980) with Jews Cobbs (1972) with African-Americans, and Giordano and Riotta-Sirey with Italians demonstrated that if people are secure in their ethnic identity, then they can act with greater freedom, flexibility, and openness to others of different cultural backgrounds. However, this literature indicates that if people receive negative or distorted images of their ethnic background they often develop a *sense of inferiority and self-hate* that can lead to aggressive behavior and discrimination toward other ethnic groups.

Father's behavior toward his children appears to be likely to foster negative and distorted images of the Jewish culture. Negative images are promoted by father's exposing the children to information that fosters the image of all individuals who do not accept his beliefs about life and existence as bad people who are destined to tortuous punishment. Father's opposition to his children being taught the history of the Holocaust is suggestive that he is likely to promote distorted beliefs about the Jewish culture and history. Further, father's mockery of his son's perception of being ridiculed for his Jewish identity, his cutting off of Ari's religiously meaningful side burns (payes), and his threats to cut off his clothing fringes (Tzitzit) suggest that he has difficulty understanding his son's emotional experience, and may respond to the child in a manner that is likely to induce guilt in the

child for having the feelings and perceptions that he does.

Father appears to have an understanding that Ari perceives himself as Jewish, that having a Jewish identity is akin to having an ethnic identity, and that should he convert to Christianity he would be met with "viscous" behavior by his mother. However, father appears to have difficulty or be unable to understand that Ari perceives his Jewishness as being his "soul" and that efforts to convince him that his religion is wrong are logically equated with convincing him that his "soul" is damaged or inadequate. Likewise, father appears to be unable to or have difficulty in understanding the potential damage in his relationship with his mother should the child accept his beliefs system. Father appears to be unable to understand that his behavior functions to force his children to choose between their mother and father and reject one by pressuring them to reject a firmly developed identity or one that is likely to be nurtured naturally. Father's change from behaving in a manner consistent with his pre-marital agreement to raise the children in the Jewish tradition and faith to attempting to covert them to Christianity, is one that places the children in a bind in which they are vulnerable to developing feelings of rejection by at least one of their parents.

Father's belief system is one in which are person can be "saved" from going to hell after their death at anytime during their life. Thus, assuming the children and parents have a normal life span, limitations on his religious education of his children during their minor years does not preclude him from saving them once they reach the age of

majority. Given the potential for father changing his religious affiliation and beliefs, preventing him from behaving in a manner that is contrary to his pre-marital agreement, and that negatively impacts his children's developed and developing Jewish ethnic identity, might also serve to foster increased psychological, social, and cultural stability in their lives. Most experts agree that efforts that limit the amount of changes in their lives after a divorce are in their best interest in that it may prevent the commonly associated sense of insecurity in the lives of children whose parents divorce. Thus, a plan that promotes the maintenance of the children's developing and developed ethnic identity is one that may be most likely to promote the children's development and adjustment while alive without precluding them from avoiding "eternal punishment" should father's belief system be accurate and should he be able to convince them that his beliefs are accurate after they reach adulthood. However, without action from the Court, father may not be able to realize this and wait until the children become adults to attempt to "save" them from "eternal punishment."

Mr. Kendall's affidavit dated July 31, 1995 indicates that mother either limits father's access to visitation and/or father has come to perceive that she does so. Personality testing suggests that mother might be prone subtle attempts to manipulate the situation and deny her motives for doing so. Either way, visitation access is a point of potential ongoing conflict. Given these parents' significant difficulty in working cooperatively, and the likelihood that this difficulty will persist, a visitation plan that is explicit, fixed, and unchangeable, without the approval of a the Court or a Court designated professional, is likely to promote the children's access to the

non-custodial parent in a manner that limits instability and their exposure to parental conflict and hostility.

During the course of my investigation it became apparent that mother and father spend more time together in the presence of the children then is commonly observed post-separation. For example mother has come to father's home during his visitation and slept on his couch and father frequently spends time at mother's home at times other than his visitation times. This behavior may be related to the personality dynamics that might interfere with their ability to emotionally free themselves from the other parent. However, I am concerned about the impact this pattern may have on the children for two reasons. First, the children are more likely to be exposed to conflict and hostility between the parents. For example, conflict arose between the parents approximately two weeks before the completion of this report when father was dining at mother's house and choose to hit his daughter with a kitchen element and mother opposed this action. Further, I am concerned that this togetherness may preclude the children from mourning the emotional loss commonly associated with parental divorce, promote their denial of the reality of the changes, and preclude their developing a psychological normalization and acceptance of their lives and family as one in which mother and father are not married.

POTENTIAL RESOLUTIONS AND INTERVENTIONS

A custody and visitation plan that is likely to promote the optimal post-divorce adjustment and development of the minor children is one that aspires to the following goals:

1. Limits the children's exposure to inter-parental conflict, hostility and aggression.

2. Provides an environment with as much stability as possible, limiting the degree of changes they must experience subsequent to the parental separation and impending divorce, including but not limited to home, school, social network, ethnic and religious identity, etc.

3. Is likely to ensure that the children establish and maintain a strong connection with at least one of their parents in which they can reliably seek and receive nurturance and guidance throughout their development.

4. In the abscence of significant parental conflict, is able to promote the children's ability to maintain a significantly meaningful relationship with the non-custodial parent.

The following potential resolutions and interventions are based on the impressions and goals articulated above. For the purpose of limiting the length of this report, the impressions on which these interventions are based may not be reiterated in this section. The reader is encourgaed to reference the Impression section above for the full context of this potential resolutions and interventions.

A plan that fosters the goals described immediately above may be one in which one parent has *sole legal custody while the non-custodial parent has liberal but fixed visitation. Irrespective of who obtains legal custody, the court is encouraged to consider a sole legal custody arrangement.*

There is no apparently significant reason to change the primary residence and physical custody of the children. Physical custody remaining with mother is associated with several advantages articulated above.

Sole-custody to one party will limit the need for shared-decision making between the parents and thus may limit the conflict between them to which the children are exposed. However, it is not likely to eliminate conflict between the parties with regard to visitation and access to the child. Therefore, *the court is encouraged to consider appointing a mental health professional with expertise in post-divorce conflict to act as an ongoing post-divorce parenting coordinator/mediator.*

Likewise, given these party's difficulty in working cooperatively to coparent, holiday and vacation schedules need to be worked out well in advance and need to be fixed with the expectation that they are not changed without due cause. Without such rigid planning the children remain vulnerable to intense conflict and interference in their ability to maintain their relationship with the non-custodial parent. Ideally, the divorce judgment or agreement will be explicit with regard to holiday and vacation visitation schedules and not rely on these parties to negotiate these plans themselves.

Should joint legal custody continue, stability and long-term effective co-parenting may be fostered by the use of a "parenting-coordinator" (i.e., post-divorce mediator). It is *recommended that the court consider appointing a mental health professional to serve in this role whether sole or joint custody is granted.* This professional could work with the parties to implement the custody/visitation plan,

limit conflict between the parties, foster optimally effective co-parenting and monitor treatment. Michael Borack, Ph.D. or Joseph Klawsnik, Ph.D. are psychologists practicing separately in Canton who have the training and expertise to provide this service.

Should the court decide to appoint an ongoing parent-coordinator/mediator it is *encouraged to make explicit the manner in which the professional's fees will be paid.* Making each party responsible for at least some portion of the professional's fees may prevent one party's ability to use the mediation process vindictively.

The Court is encouraged to consider a plan that permits the non-custodial parent to maintain their relationship with the child in a manner that does not promote their rejection of aspects of their own ethnic, cultural, and religious identity or promote their alienation from the primary custodial parent and the related difficulties discussed above. Thus, the Court is encouraged to mandate a custody and visitation plan that precludes the children from exposure to father's religious beliefs. For example, the court may wish to order father to refrain from educating the children in his religious beliefs to prevent the likely harm described above.

An example one potential visitation plan is that father has the children every Sunday following his return from his Church and returns them on Monday morning to their school, in the case of Moriah and Ari, or to their mother, in the case of Rebekah. Likewise, the court may wish to consider ordering that father visits with the children one weekday each week from after to school to after dinner. Should father's job preclude him from picking up

the children after school, a reasonable alternative might be considered to allow father regular and consistent mid-week visitation with the children.

Should the non-custodial parent be unable to conduct themself in a manner that promotes their emotional well-being by not acting in ways that may alienate them from their custodial parent, social network, and own self-identity, the court may wish to consider ordering that visitation with the non-custodial parent not take place without supervision by a professional with training in providing supervised visitation in high-conflict post-divorce matters. Ideally, the non-custodial parent would first be given an opportunity to demonstrate that he or she could maintain a relationship with the children without the behavior of concern.

The children, especially Ari, are vulnerable to blaming themselves for the potential rejection that they may experience if either parent's wishes, with regard to religious upbringing, are not supported. Ideally, mother and father would be able to recognize the children's emotional experience and help them understand that they are not to blame and that the other parent is not bad or evil for fostering their identity in the decided manner. However, it is unlikely that the parents, especially the father, will be able to provide this reassurance. Therefore, the Court may wish to mandate an external intervention in which the decision of the court is explained to the children, in a developmentally appropriate manner, with the goal of helping them understand that they are being raised in the way they are because the *Court* believes that it is in their best interest. This intervention may help them avoid blaming themselves or their parents in a

manner that may negatively impact their emotional functioning and parent-child relationships. This intervention might be provided by the Judge herself, a family service officer, a designated psychotherapist, the court-ordered post-divorce parenting coordinator, or this Guardian ad litem if the court deems it appropriate.

Because of the concern described above regarding the parents' unusual amount of time spent together and the potential negative impact on the children, the Court may wish to consider making an order that precludes such contact. For example, the Court may consider ordering the parents to explicitly not being together in the presence of the children at times other than that necessary for the visitation transfer and to attend events of significance in the children's lives.

Given the potentially negative impact on the children should mother return to regular marijuana use following the termination of the litigation, the Court may wish to consider ordering her participation in random hair sample drug testing. Because hair samples can generally detect marijuana use for 90 days, quaterly testing should be sufficient. This testing could be arranged with FSO Howard Crossman of the Quincy District Court for minimal expense. Test results could be ordered to be provided to the parenting coorordinator if so ordered as described above, or another representative of the Probate Court.

Respectfully submitted,

/s/ Michael A. Goldberg
Michael A. Goldberg, Ph.D.
Guardian ad Litem

Supreme Court, U.S.
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No. 97-1756

In The

Supreme Court of the United States

October Term, 1997

JEFFREY KENDALL,

Petitioner,

v.

BARBARA KENDALL,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of The Commonwealth Of Massachusetts

RESPONDENT BARBARA KENDALL'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Supreme Court of the United States has jurisdiction to consider whether independent appellate review was to be applied by the Supreme Judicial Court of the Commonwealth of Massachusetts in *Kendall v. Kendall*, and if so, whether the *Kendall* court properly applied the clearly erroneous standard.

II. Whether the trial court properly limited a litigant's individual liberties under the free exercise clause and establishment clause of the United States Constitution in a Judgment of Divorce by restricting the litigant from exposing the children to limited aspects of his religion in order to promote the best interests of the children.

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The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts is reported at 426 Mass. 238, 687 N.E.2d 1228 (1997). The Supreme Judicial Court's decision is reproduced in Appendix 1-20 in Jeffrey Kendall's Petition for Writ of Certiorari.

JURISDICTION

The Judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts in *Kendall v. Kendall* was entered on December 9, 1997. The Supreme Judicial Court of the Commonwealth of Massachusetts denied a petition for rehearing on January 27, 1998 without opinion.

The Supreme Court of the United States is without jurisdiction to consider whether the Supreme Judicial Court of the Commonwealth of Massachusetts should have applied independent appellate review pursuant to 28 U.S.C. § 1257.

The Supreme Court of the United States has jurisdiction pursuant to 28 U.S.C. § 1257 to consider whether the Supreme Judicial Court of the Commonwealth of Massachusetts properly limited the Petitioner's constitutional liberties in a Judgment of Divorce by restricting him from exposing the children to limited aspects of his religion to promote the best interests of the children.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

A. Nature of the Case

The custodial disputes involved in this case arise from a religious conflict between the parties: Barbara Zeitler-Kendall (hereinafter referred to as "the Respondent") is an Orthodox Jew while Jeffrey P. Kendall (hereinafter referred to as "the Petitioner") is a born-again Christian. Each party wishes to raise their three children according to their religious beliefs. The children, who have been raised in a Jewish household, have Jewish names and a Jewish cultural identity, are experiencing emotional distress because of their exposure by the Petitioner to certain aspects of his religion, which attempts to teach them, *inter alia*, that in order to be "saved," they must accept Jesus Christ. These teachings contradict their Jewish ethnicity, and forces them to regard their mother as someone doomed to hell and place them in the unenviable position of having to regard choosing between religions as choosing between their parents.

At trial, the lower Court heard testimony regarding the religious conflict between the parties and the emotional distress suffered by the children – and properly entered a judgment limiting the Petitioner's ability to expose the children to his religion which promotes rejection, rather than acceptance of the Respondent and the children's own Jewish self-identity.

The Petitioner has appealed this aspect of the judgment as well as the standard of review the Supreme Judicial Court of the Commonwealth of Massachusetts used in reviewing the lower court's judgment.

B. Procedural History

The Petitioner and the Respondent were married on April 24, 1988. (App. 31). The parties have three children: Ariel, born on October 10, 1988; Moriah, born on May 19, 1991; and Rebekah, born on April 21, 1993. (App. 31).

On November 22, 1994, the Respondent filed a Complaint for Divorce with the Norfolk Probate and Family Court, Commonwealth of Massachusetts, pursuant to MASS. GEN. L. ch. 208, § 1B (1998). In her complaint she sought, *inter alia*, custody of the parties' three minor children. Subsequently, on December 6, 1994, the Petitioner answered the Respondent's complaint and similarly requested, *inter alia*, custody of the parties' children.

On December 9, 1994, the parties entered into a stipulation, which was incorporated into a Temporary Order, where, in relevant part, they agreed that: the Respondent would have temporary physical custody of the children;

the Petitioner would have liberal visitation rights during the week; and neither party would make derogatory remarks about the other parent or their respective religion. The court further provided that the Petitioner would have visitation rights every other weekend from Saturday at sundown to Sunday at 6:00 p.m.

Throughout the pending divorce, the Respondent attempted to modify the order as it related to weekend visitation and access to the children. The Petitioner sought to have additional visitation with the children over the weekend, and desired to expose the children to his Christian religious beliefs.

On September 28, 1995, the Respondent filed a Motion to Appoint a Guardian Ad Litem. The court (Harms, J.) allowed Respondent's motion, and on October 12, 1995, appointed Dr. Michael Goldberg to "address the inter-religious conflict between the parties." (App. 30).

Following a five day trial, the court (Harms, J.) issued Findings of Fact and Conclusions of Law (App. 30) and a Judgment of Divorce Nisi (App. 23). The court's judgment provided, in pertinent part, that:

1. The parties shall have joint legal custody of the children. (App. 23, ¶ 1).

2. Each parent shall be entitled to share his/her religious beliefs with the children with restrictions as follows: neither may indoctrinate the children in a manner which substantially promotes their rejection of their Jewish ethnic and religious identity, or promotes their alienation from either parent or their rejection of either parent. The [Respondent] shall not take the children to his

> church (whether to church services or Sunday School or church educational programs); nor engage them in prayer or bible study *if it promotes rejection, rather than acceptance, of their mother or their own Jewish self-identity*. The [Respondent] shall not share his religious beliefs with the children *if those beliefs cause the children significant emotional distress or worry about their mother or about themselves*. (App. 25, ¶ 5). **(Emphasis supplied)**

The Petitioner timely claimed appeals from the relevant rulings. The Petitioner, however, failed to address the issue regarding which standard of review should be applied.

The Supreme Judicial Court of the Commonwealth of Massachusetts granted the Petitioner's application for direct appellate review. The case was argued on October 7, 1997, and a decision was rendered on December 9, 1997. The Petitioner thereafter, filed a Petition for Rehearing on December 23, 1997, asserting, for the first time, that the court was to apply independent appellate review.

The Petition for Rehearing was denied on January 27, 1998 without opinion.

The decision of the Supreme Judicial Court upheld the rulings of the Trial Judge.

STATEMENT OF FACTS

The Respondent and the Petitioner were married on April 24, 1988. (App. 31). Although the Respondent was

Jewish and the Petitioner a non-practicing Roman Catholic, the couple were married in a traditional Jewish wedding ceremony. (App. 33). The parties specifically agreed that their children would be raised with a Jewish identity and in a Jewish home. (App. 33, 34).

The parties' children were given traditional Jewish names and formal Jewish ceremonies, which the Petitioner participated in. (App. 33). The parties celebrated the Sabbath on Friday nights and celebrated Jewish high holidays together. (App. 34). Since the birth of the first child, the Respondent and the children attended a "Jewish family camp" for a week each year, and the Petitioner joined them on several occasions. (App. 34).

In 1994, the Respondent decided to attend an Orthodox synagogue and adhere to Orthodox teachings. (App. 35). The children attended the Orthodox synagogue with the Respondent. As a result, the parties maintained a "kosher"[1] household; observed "shabas" weekly from Friday at sundown to an hour after sundown on Saturday; and, did not work or travel by car on shabas. (App. 34). The children also adhered to the Jewish Orthodox traditions and the family celebrated shabas and all religious holidays. Ari began wearing "payes" (long side burns worn by Orthodox Jews), a "kipah" (yarmulke), and "tzitzit" (a religiously significant garment with four

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[1] The term kosher (kashrut) denotes a universe of laws, rules, and regulations and their observance in a manner that is in accordance with tradition. Kashrut transforms the act of nourishment into a celebration of the spirit and the body into a vessel of the divine. Leo Trepp, *The Complete Book of Jewish Observance*, 55 (1980).

long strands that are knotted) on a daily basis. Additionally, the children were enrolled in a private Jewish school. The Petitioner did not object to enrolling the children in the Jewish school.

The Petitioner began attending Bible study classes of the Boston Church of Christ (a Fundamental Christian Church) in October of 1990. (App. 34). His growing involvement with the Boston Church, which included Sunday services (taking up to a half-day) and weekly Bible studies (up to three nights a week), as well as nightly activities, began to cause strain on the marital relationship. (App. 34-36).

In particular, based on the Boston Church of Christ's directive to proselytize, the Petitioner began requesting that Respondent embrace his faith. The Petitioner similarly began attempting to share his new found faith with his children as well and wanted to bring the children to church. (App. 36-37).

The Petitioner believes, that in order to have a "right relationship" with God, one must adopt Jesus Christ as their personal savior, otherwise, that person will go to hell. (App. 34-35). According to the Guardian Ad Litem's[2] report, the Petitioner believes that people who do not believe in Jesus Christ will go to "eternal punishment, the second death which is separate from God for eternity." (App. 100).

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[2] The guardian ad litem, a well respected psychiatrist specifically experienced in the area of inter-religious conflict, prepared an extensive independent evaluation. He filed with the trial court an extensive report, and also testified at length subject to cross examination by the Petitioner.

In September, 1994, the couple separated. Over the Respondent's objections, the Petitioner continued to expose the children to the Boston Church of Christ. The Petitioner admitted that "he will do what the Bible says to help [the children be saved]," and stated to the Guardian Ad Litem that he "would never stop trying to convert the children." (App. 36).

In support of these pursuits and ideals, the Petitioner has read to his children scriptures from the Bible; used the Bible to teach them; prayed with the children invoking Jesus Christ's name; brought the children to church services; and allowed the children to watch videos with Christian themes. At these services, the children have been exposed to the belief that nonbelievers, i.e. persons such as their mother, are doomed to hell. (App. 100). Moreover, the Petitioner has expressed to the children that the Respondent will go to hell if she does not convert to the beliefs of the Boston Church of Christ. (App. 100). At the same time as the Petitioner was exposing the children to Christian beliefs, he objected to the children's celebrating the Sabbath.

The Petitioner has not merely exposed the children to a different spiritual viewpoint; he has taken affirmative, hostile steps to erode the children's Jewish identity by tearing down the spiritual accouterments of their religion. For example, in the summer of 1995, Ari wore payes. The Petitioner took steps to shave Ari's head so he could have a "mohawk". The Respondent specifically demanded that the Petitioner not cut Ari's hair, but the Petitioner disregarded the Respondent's pleas, obtained the appropriate tools and cut Ari's hair in the Respondent's presence. (App. 21).

In the fall of 1994, (in furtherance of his Orthodox Jewish identity) Ari began wearing tzitzit. The Petitioner noticed that Ari was wearing the tzitzit and stated to Ari several times, in an angry, threatening voice, "Take those off or I am going to cut them off." The Guardian Ad Litem and the court found this incident to be reflective of the Petitioner's intolerance of the children's religion and aptly demonstrated the conflict faced by the children. The evidence at trial of harm to the children rests on Dr. Goldberg's report. The Guardian Ad Litem, as outlined in his report, interviewed the Respondent, the Petitioner, the children, as well as the children's teachers. Based on the Guardian Ad Litem's observations of the religious conflict (summarized above) the Guardian Ad Litem concluded that it was in the children's best interest not to be exposed to the Petitioner's religion. (App. 136).

Dr. Goldberg's report and testimony (which were largely adopted by the court) compels the finding that continued exposure to the Petitioner's religion will have a deleterious effect on the children and undermine their custodial relationship with their mother. In sum, Dr. Goldberg determined that:

1. A custody plan that requires the parents to make joint decisions will likely result in excessive and persistent hostility and conflict to which the children are likely to be exposed. (App. 117).

2. The Petitioner exposes the children to religious experiences and practices that he knows may have detrimental effects on the children. (App. 121).

3. The Petitioner behaves in this manner in order to save the children from eternal punishment. (App. 121).

4. Without determining whether either parties' religion is right or wrong, the Petitioner's behavior has a potentially negative impact on the children. (App. 123).

5. Although Ari's experiences do not meet criteria for formal psychiatric diagnosis, he is emotionally distressed by his need for the Petitioner's affection and his desire to maintain his Jewish identity. (App. 122).

6. In light of this conflict, Ari has suffered a decline in his motivation and academic conduct. (App. 122).

7. Moriah too is experiencing emotional distress. (App. 123).

8. Both Ari and Moriah perceive themselves as being Jewish. (App. 125-126).

9. Rebekah is too young to have formed a Jewish identity, although given the fact that Rebekah will most likely reside with the Respondent, she will develop such an identity. (App. 126).

10. Ari's belief system (and Rebekah and Moriah's once they further develop Jewish concepts) will allow him to accept the Petitioner without needing to change him. (App. 127).

11. If, however, the children accept the Petitioner's religious views, they will view the Respondent negatively. This view will have a negative impact on their relationship with the Respondent. (App. 127).

12. If the children develop a negative view of the Respondent or reject her beliefs they may suffer hostility and rejection from the Respondent. If this were to occur the children may resent the Petitioner for undermining their relationship with the Respondent. Thus, the children would not have good relationships with either parent. (App. 127-128).

13. The Petitioner's behavior fosters negative and distorted images of Jewish culture. (App. 130).

14. The Petitioner's actions force the children to choose between their parents. (App. 131).

Based on these facts, Dr. Goldberg concluded that "the court is encouraged to consider a plan that permits the non-custodial parent to maintain their relationship with the child in a manner that does not promote their rejection of aspects of their own ethnic, cultural, and religious identity or promote their alienation from the primary custodial parent and the related difficulties discussed above." (App. 136).

SUMMARY OF ARGUMENT

The Supreme Court of the United States is without jurisdiction to consider whether the Supreme Judicial Court of the Commonwealth of Massachusetts should have applied independent appellate review pursuant to 28 U.S.C. § 1257. Nonetheless, the court properly applied

the clearly erroneous standard, similar to other courts of last resort.

The Supreme Judicial Court's decision in *Kendall v. Kendall* properly held that the lower court's limited prohibition of the Petitioner from exposing the children to selected aspects of his religion are supported by the evidence and comply with *Wisconsin v. Yoder*, 406 U.S. 205 (1972), as well as courts of last resort. The trial court appointed a qualified Guardian Ad Litem, who examined the parties' religious conflict and found that exposure to the Petitioner's religion is detrimental to the children.

Moreover, because the lower court's rulings are based on an affirmative showing of harm to the children, the court's orders comply with constitutional guidelines. The orders are narrowly tailored and do not unduly burden the Petitioner's right to practice his religion; rather, the orders only limit the Petitioner from exposing the children to aspects of his religion that were causing affirmative harm to the children. The court did not create an ethnic identity for the children. The court merely acknowledged the preference that the parties allowed to develop, and one which the Petitioner, until recently, encouraged.

Additionally, the court's limitation of the children's exposure to the Petitioner's religion was intended for a wholly secular purpose; to limit the emotional harm to the children which was caused by exposure to the negative messages of the Petitioner's religion. Despite the Petitioner's assertion, the case at bar is simply a court

focusing on the best interests of the parties' children rather than the Petitioner's religion.

REASONS WHY JEFFREY P. KENDALL'S PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

I. THE SUPREME COURT OF THE UNITED STATES DOES NOT HAVE JURISDICTION TO CONSIDER PETITIONER'S CLAIM THAT APPELLATE COURTS MUST EXERCISE INDEPENDENT APPELLATE REVIEW OVER CONSTITUTIONAL FACTS IN CASES INVOLVING EXERCISE OF THE FIRST AMENDMENT RIGHT TO FREEDOM OF RELIGION.

The Supreme Court of the United States does not have jurisdiction to address whether the Supreme Judicial Court of the Commonwealth of Massachusetts was to apply independent appellate review in *Kendall v. Kendall,* 426 Mass. 238, 687 N.E.2d 1228 (1997). 28 U.S.C. § 1257. The Petitioner contends that the Supreme Judicial Court improperly reviewed the case at bar under a "clearly erroneous" standard rather than an "independent appellate review" standard. (Petitioner Brief, pp. 8-14).

The Supreme Court of the United States may not review a final judgment of a state court unless the issue was properly raised. *Board of Directors of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 549-50 (1987). Massachusetts Rules of Appellate Procedure 16 required the Petitioner to present in his brief all legal issues and if not properly raised, it was deemed waived. Mass. R. App. P. 16. The Petitioner failed to address the issue regarding independent appellate review to the Supreme Judicial

Court of the Commonwealth of Massachusetts. The Petitioner raised the present issue for the first time in his Petition for Rehearing, which was denied without opinion. (App. 60). Similarly, in *Board of Directors of Rotary Int'l*, this Court refused to review an issue not properly presented to the state court where:

> [a]ppellants did not present the issues squarely to the state courts until they filed their petition for rehearing with the Court of Appeal. The Court denied the petition without opinion. When the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. *Board of Directors of Rotary Int'l*, 481 U.S. at 550.

In the present case, the Petitioner has failed to make such a showing.

Further, as evidenced in the Petitioner's present Petition for Writ of Certiorari (App. 10), there is no established precedent that supports his contention that the Massachusetts Supreme Judicial Court was required to apply independent appellate review in the case at bar and; thus, this was clearly a legal issue that should have been addressed to the Supreme Judicial Court of the Commonwealth of Massachusetts. Accordingly, this Court is without jurisdiction pursuant to 28 U.S.C. § 1257 to consider the Petitioner's claim regarding independent appellate review.

A. The Supreme Judicial Court of the Commonwealth of Massachusetts Properly Applied the "Clearly Erroneous" Standard of Review in *Kendall v. Kendall.*

Despite the respondent's broad reading of *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), this Court did not indicate it was re-defining the clearly erroneous rule nor did it indicate it was drawing a line for "special facts . . . deemed to have constitutional significance" such as cases involving Exercise of the First Amendment Right to Freedom of Religion. *Bose*, 466 U.S. at 505; *see also* Childress, *Constitutional Fact and Process: A First Amendment Model of Censorial Discretion*, 70 TUL. L. REV. 1229, 1267 (1996). Nor has this Court invoked *Bose* in this broad way. *Cf. Anderson v. Bessemer City*, 470 U.S. 364, 573-76 (1985) (Title VII, not citing *Bose*).

Rather, in First Amendment cases, this Court has held that independent appellate review is required only in cases implicating "restrictions on the freedom of speech protected by the First Amendment, particularly in those cases in which it is contended that the communication in issue is within one of the few classes of 'unprotected' speech." *Bose* at 503. These cases have included libelous speech, fighting words, incitement to riot, obscenity, and child pornography. *See Bose*, 466 U.S. at 504 (citing cases). Yet, this Court has never required independent appellate review over cases involving the First Amendment Right to Freedom of Religion.

Further, issues concerning mixed questions of law and fact in which the applicable legal standard requires for a strictly factual test involves an "essentially factual

inquiry." *United States v. McConney*, 728 F.2d 1195, 1203 (1984) (*citing Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982). Similar to the *Kendall* Court, courts of last resort, prior to and since *Bose*, have uniformly used the clearly erroneous standard in reviewing a lower court's restriction over a parent's religion to ensure a child's best interests. *See e.g., LeDoux v. LeDoux*, 234 Neb. 479, 452 N.W.2d 1 (1990); *Khalsa v. Khalsa*, 107 N.M. 31, 751 P.2d 715 (1988); *Welker v. Welker*, 24 Wis. 2d 570, 129 N.W.2d 134 (1964).

Moreover, as discussed *supra*, the Supreme Court of the United States held that, in areas of religious upbringing, a parent's individual liberties may be constitutionally restricted upon a showing of substantial threat of harm to a child's health. *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972). Therefore, the best interest of the child standard trumps the constitutional issues involved, mandating courts to apply the "clearly erroneous" standard.

B. The Supreme Judicial Court of the Commonwealth of Massachusetts' Decision in *Kendall v. Kendall* Would Have Similar Results if Independent Appellate Review Was Used.

In the case at bar, the Respondent was "required to demonstrate in detail that exposure to [the Petitioner's] religion caused the children substantial injury, physical or emotional, and [would] have a like harmful tendency for the future." (App. 7-8). If the Supreme Judicial Court of the Commonwealth of Massachusetts had applied independent appellate review, the court would have come to

the same conclusion; that substantial harm to the children was properly demonstrated.

For example, the Guardian Ad Litem found, in relevant part: "[The Petitioner] threatened to cut the fringe off Ariel's tzitzitz if he did not tuck it inside his pants. This greatly upset Ariel . . . " (App. 11); " . . . Ari has drawn from the above teaching the conclusion that [the Respondent] may go to hell, and that this causes him substantial worry and upset." (App. 12); " . . . Ari . . . is emotionally distressed by the conflict . . . there has been a decline in his motivation and academic performance." (App. 13); " . . . Moriah is experiencing emotional distress related to the parental conflict . . . " (App. 14). Clearly, the lower court's findings were beyond conjecture. The Guardian Ad Litem presented, and the Supreme Judicial Court of the Commonwealth of Massachusetts correctly found, that there was sufficient evidence (including independent psychological findings) demonstrating that the children experienced physical and emotional harm as a result of their exposure to the Petitioner's religious teachings

II. THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS' DECISION IN *KENDALL V. KENDALL* IS CONSISTENT WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT.

Jeffrey P. Kendall's petition for Writ of Certiorari should be denied as the Supreme Judicial Court's decision in *Kendall v. Kendall*, 426 Mass. 238, 687 N.E.2d 1228 (1997) is not in conflict with the reported decisions of

other courts of last resort. Sup. Ct. R. 10(b). To the contrary, those courts having ruled upon the issues at bar have uniformly upheld, as did the Supreme Judicial Court of the Commonwealth of Massachusetts in this case, the constitutionality of limiting an individual's liberties in order to promote the best interests of a child.

The Supreme Court of the United States has stated that the twofold concept of the Free Exercise Clause provides that "laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices" and that "the family itself is not beyond regulation in the public interest, as against a claim of religious liberty." *Reynolds v. United States*, 98 U.S. 145, 166 (1878).

Although the First Amendment confers upon individuals the right to free exercise of religion without state interference, *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *Sherbert v. Verner*, 374 U.S. 398, 402 (1963) and that parents have a fundamental right to control their children's religious education free from unreasonable state intervention, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925), the United States Constitution allows limitations on individual liberties where a compelling interest exists. *Wisconsin*, 406 U.S. at 230; *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944). In addition, the state under the parens patriae doctrine, has a duty to protect a child's well-being. *Wisconsin*, 406 U.S. at 220; *Prince*, 321 U.S. at 166-67. This duty and authority is "not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience." *Prince*, 321 U.S. at 166-67.

It has been well established by this Court that promoting the best interests of a child is a compelling interest sufficient to curtail the individual liberties of the child's parents. *Prince*, 321 U.S. at 166-67. This Court has also held unequivocally that a state has a compelling interest in "safeguarding the physical and psychological well-being of a minor." *New York v. Ferber*, 458 U.S. 747, 756-57 (1982); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). Specifically, in matters of religious upbringing, a parent's individual liberties may be constitutionally restricted upon a showing of substantial threat of harm to the physical and mental health of the child. *Wisconsin*, 406 U.S. at 230.

Accordingly, courts of last resort that have addressed the same issue at bar are in accord that to constitutionally restrict a parent from exposing his or her religious practices to the minor child, there must be a clear, affirmative showing of harm caused by exposure to the religious practices of that parent. *Chandler v. Bishop*, 702 A.2d 813 (NH 1997); *Osteraas v. Osteraas*, 859 P.2d 948 (Idaho 1993); *Kirchner v. Caughey*, 326 Md. 567, 606 A.2d 257 (1992); *Pater v. Pater*, 588 N.E.2d 794 (Ohio 1992); *LeDoux v. LeDoux*, 234 Neb. 479, 452 N.W.2d 1 (1990); *Khalsa v. Khalsa*, 107 N.M. 31, 751 P.2d 715 (1988); *Funk v. Ossman*, 150 Ariz. 578, 724 P.2d 1247 (1986); *In re Marriage of Short*, 698 P.2d 1310 (Colo. 1985); *Felton v. Felton*, 383 Mass. 232, 418 N.E.2d 606 (1981); *Harris v. Harris*, 343 So. 2d 762 (Miss. 1977); *In re Green*, 448 Pa. 338, 292 A.2d 387 (1972); *Munoz v. Munoz*, 489 P.2d 1133 (Wash. 1971).

In *Felton v. Felton*, the Supreme Judicial Court of the Commonwealth of Massachusetts aptly recognized that in situations where custody is contested because of religious

issues, an independent investigator should be appointed to present to the trial court unbiased facts. *Felton v. Felton*, 383 Mass. 232, 242, 418 N.E.2d 606, 611 (1981). *See also LeDoux v. LeDoux*, 452 N.W.2d 1 (Neb. 1990) (barring father from exposing children to teachings of Jehovah's Witnesses based on testimony from a certified clinical psychologist).

In this case, the trial court assured constitutional safeguards by appointing a qualified Guardian Ad Litem to examine the religious conflict between the parties. *Felton, supra* at 242, 418 N.E.2d at 611. The Guardian Ad Litem interviewed the parties, the children, and the children's teachers and issued a comprehensive 37 page report. (App. pp. 74-138).

The Guardian Ad Litem's report, does not contain general allegations of "confusion" or false cries of "harm." Rather, interviews with the children reflect the fact that the children's exposure to aspects of the Petitioner's religion causes the children emotional turmoil and physical overt manifestations of this conflict.

In addition, because the state has a compelling interest in protecting a child, the Establishment Clause does not prevent courts from considering religion when one parent's religious practices caused emotional or physical harm to the child. *Osteraas v. Osteraas*, 124 Idaho 350, 859 P.2d 948 (1993); *Waites v. Waites*, 567 S.W.2d 326, 333 (Mo. 1978); *Welker v. Welker*, 24 Wis. 2d 570, 576, 129 N.W.2d 134, 138 (1964).

In the case at bar, the trial court did not establish Judaism as the religion to govern the children's upbringing. Rather, the court simply recognized the preference of

religion that the Petitioner and the Respondent allowed to develop and which the Respondent had encouraged prior to his involvement with the Boston Church of Christ. The trial court's order was wholly secular, intended not to favor a religion, but instead, to limit the emotional harm to the children caused by exposure to the Petitioner's religious teachings. The order also does not foster excessive government entanglement by simply allowing any judicial inquiry to center on the emotional harm to the children.

There is a vast difference between a court concentrating on the religious choice of a parent as compared to concentrating on the best interests of a child. This difference is not superficial, but rather fundamental. Although a court may not favor or prefer a religion, a court must favor the best interests of a child. *See Waites v. Waites*, 567 S.W.2d 326, 333 (1978).

Additionally, it is well established by this Court that the Establishment Clause requires laws which grant denominational preferences to be justified by a compelling governmental interest and must be narrowly drawn to further that interest. *Larson v. Valente*, 456 U.S. 228, 247 (1982). In the case at bar, the governmental interest in promoting the best interests of the child was narrowly tailored. The court's prohibitions are the least intrusive means of limiting the Petitioner's religious rights. The Petitioner is not precluded from attending church; rather, the limitation is on the Petitioner's ability to expose the children to concepts which undermine their ethnic heritage or cause them to reject the Respondent, all in keeping with a promotion of the best interests of the children. In fact, the court's order allows the Petitioner to take the

children to Sunday School, so long as he tape records the classes (for later review if necessary).

The Supreme Judicial Court of the Commonwealth of Massachusetts' decision in this case was consistent with the decisions of other courts of last resort which have ruled on these issues.

CONCLUSION

For the aforementioned reasons, Respondent requests that this Honorable Court deny Jeffrey Kendall's Petition for Writ of Certiorari.

Respectfully submitted,

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May 26, 1998

APPENDIX

MASSACHUSETTS GENERAL LAWS.

Chapter 208.

§ 1B. Irretrievable breakdown of marriage; commencement of action; waiting period; unaccompanied complaint; procedure

An action for divorce on the ground of an irretrievable breakdown of the marriage may be commenced by the filing of the complaint unaccompanied by the signed statement and dissolution agreement of the parties required in section one A.

No earlier than six months after the filing of the complaint, there shall be a hearing and the court may enter a judgment of divorce nisi if the court finds that there has existed, for the period following the filing of the complaint and up to the date of the hearing, a continuing irretrievable breakdown of the marriage.

Notwithstanding the foregoing, at the election of the court hereunder, the aforesaid six month period may be waived to allow the consolidation for the purposes of hearing a complaint commenced under this section with a complaint for divorce commenced by the opposing party under section one.

The filing of a complaint for divorce under this section shall not affect the ability of the defendant to obtain a hearing on a complaint for divorce filed under section one, even if the aforesaid six month period has not yet expired.

Said six month period shall be determined from the filing of a complaint for divorce. In the event that a

complaint for divorce is commenced in accordance with the provisions of section one A or is for a cause set forth under section one, and said complaint is later amended to set forth the ground established in this section, the six month period herein set forth shall be computed from the date of the filing of said complaint.

As part of the entry of the judgment of divorce nisi, appropriate orders shall be made by the court with respect to custody, support and maintenance of children, and, in accordance with the provisions of section thirty-four, for alimony and for the disposition of marital property.

Nothing in the foregoing shall prevent the court, at any time prior to judgment, from making temporary orders for custody, support and maintenance or such other temporary orders as it deems appropriate, including referral of the parties and the children, if any, for marriage or family counseling.

Prior to the entry of judgment under this section, in the event that the parties file the statement and dissolution agreement as required under section one A hereinabove, then said action for divorce shall proceed under said section one A.

SUPREME COURT RULES.

Part III – Jurisdiction on Writ of Certiorari

Rule 10. Considerations governing review on certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

. . . .

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

. . . .

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

MASSACHUSETTS RULES OF APPELLATE PROCEDURE

Rule 16 – Briefs

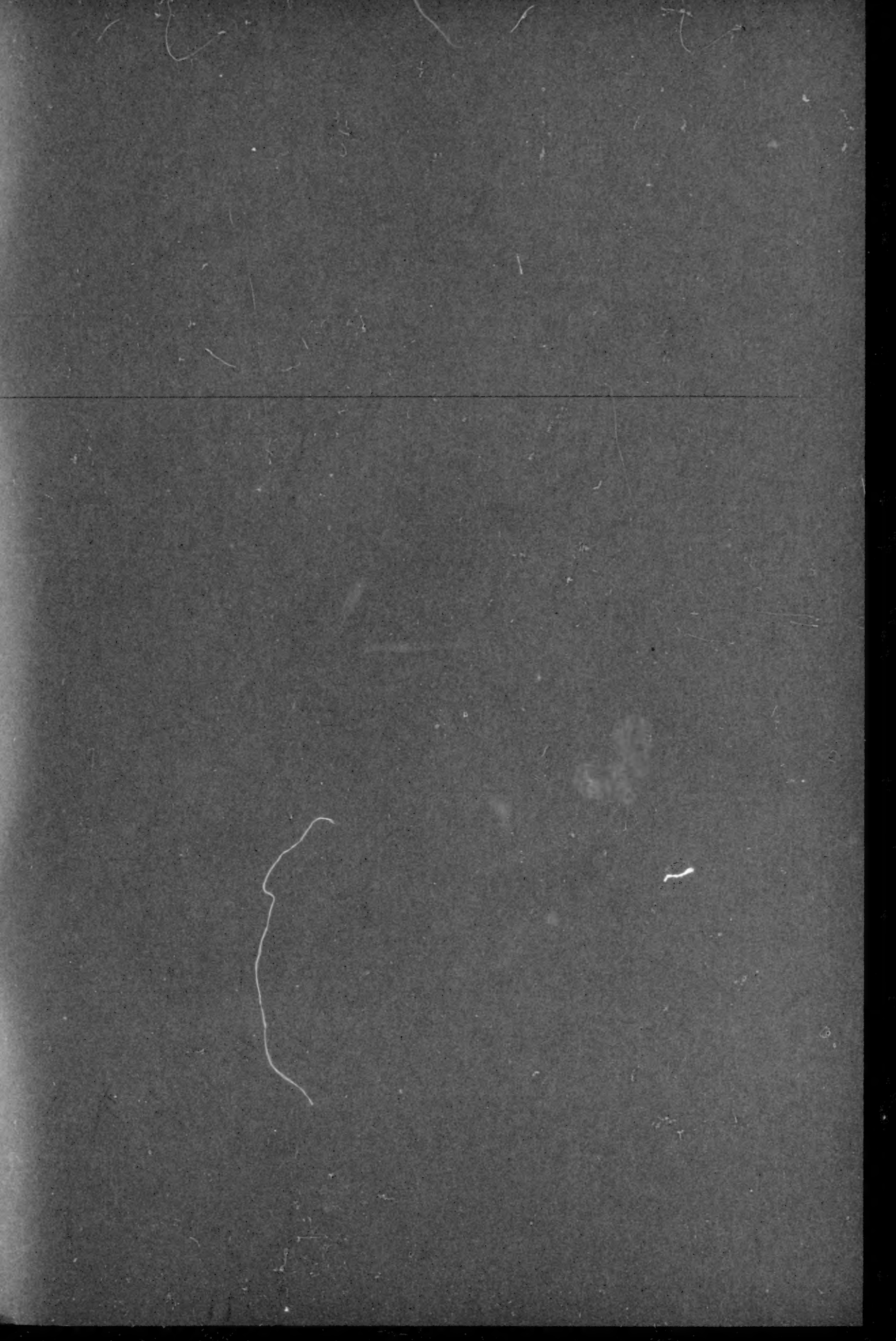
(a) **Brief of the Appellant.** The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) In all briefs, a table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

(2) A statement of the issues presented for review.

(3) A statement of the case, which shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e)).

(4) The argument, which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. In a brief with more than twenty-four pages of argument, there shall be a short summary of argument, suitably paragraphed and with page references to later material in the brief dealing with the same subject matter, which should be a condensation of the argument actually made in the body of the brief, and not a mere repetition of the headings under which the argument is arranged. The appellate court need not pass upon questions or issues not argued in the brief. Nothing argued in the brief shall be deemed to be waived by a failure to argue orally.



No. 97-1756

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In The

Supreme Court of the United States

October Term, 1997

JEFFREY KENDALL,

Petitioner,

v.

BARBARA KENDALL,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of The Commonwealth Of Massachusetts

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. RESPONDENT'S OPPOSITION BRIEF IS RIDDLED WITH MISCHARACTERIZATIONS OF THE RECORD FACTS.

Respondent's opposition brief ("Opposition" or "Opp.") contains numerous misleading characterizations of the facts and distortions of the record, only a few of which can be addressed here. Most egregiously, Respondent seeks to characterize this dispute as stemming from "each" party's desire "to raise their three children according to their religious beliefs." (Opp. at 2.) In fact, it is only the Respondent, Barbara Kendall ("Barbara"), who seeks exclusively to impose her religious beliefs on the children. Petitioner Jeffrey Kendall ("Jeffrey") seeks merely to be able to continue to *expose* his children – the offspring of an interfaith union – to Christianity as well as Judaism. Barbara has vigorously opposed that effort.

Respondent also describes the Kendall home as an Orthodox Jewish household (Opp. at 6) and then asserts, falsely, that Jeffrey "objected to the children celebrating the Sabbath" (Opp. at 8). In fact, the record is clear that since 1991, Barbara and Jeffrey's children were exposed to both Christianity and Reform Judaism and suffered no apparent ill effects. The Probate Court found that Jeffrey "knows the Hebrew Prayers for wine, bread and light and sang them regularly with his family at Friday night dinners" between 1992 and 1994 – three years *after* he joined the Boston Church of Christ. (App. 34.) It is also undisputed that during the marriage Jeffrey regularly brought the children to Christian Sunday services, even as they were being raised as Reform Jews. (App. 102-103.) Respondent asserts – falsely – that "the Petitioner has expressed to the children that the Respondent will go to hell if she does not convert to the beliefs of the Boston Church of Christ." (Opp. at 8.) Nothing in the record or in the findings of any court below supports this false accusation. Jeffrey never told his children that their mother would go to hell.

Respondent further distorts the nature of the understanding between Barbara and Jeffrey regarding the religious upbringing of their children. Although they shared an understanding that they would raise their children in the Reform Jewish tradition,[1] and even sent the children to Jewish day school in exchange for financial support from Barbara's mother, Barbara and Jeffrey never discussed rearing the children as *Orthodox* Jews, whose beliefs and practices differ in many significant respects from those of Reform Jews. Moreover, Jeffrey never agreed to preclude his children from all exposure to Christianity.

Respondent's Opposition reveals, often quite candidly, that the judgment below was based, impermissibly, on negative and distorted images of Jeffrey's Christian religious *beliefs*, rather than his religious practices or conduct. Moreover, the courts below failed to distinguish between signs of emotional distress caused by the parents' bitterly contested divorce, and distress caused by exposure to the teachings of Jeffrey's church – teachings to which they were exposed well before the supposed distress first surfaced. Respondent distorts the record by repeatedly asserting that all three children suffered "physical and emotional harm as a result of their exposure to the Petitioner's *religious teachings.*" (Opp. at 17 (emphasis added), 20, 21.) These allegations grossly exaggerate the guardian ad litem's actual "findings" of very minimal (if any) harm – findings adopted wholesale by the Probate Court[2] – which were based on supposed emotional (rather than physical) harm that the eldest child, Ari (age 7 at the time of trial), suffered as a result of his parents' conflict. (App. 122.) The guardian ad litem concluded that Moriah (age 5) "is experiencing emotional distress *related to the parental conflict and separation,*" and not to the father's religious

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[1] The Massachusetts Supreme Judicial Court noted that such predivorce agreements generally are unconstitutionally unenforceable. (App. 3 n.5.)

[2] The Probate Court judge herself never met with, interviewed, or examined the children.

beliefs. (App. 123.) There was no finding that the youngest child – 3-year-old Rebekah – suffered any distress. Nonetheless, the Probate Court severely restricted Jeffrey's interactions with her as well.

Three pages of the Opposition are devoted to the highly speculative findings of the guardian ad litem, a non-lawyer, rather than to any findings of the Probate Court or Massachusetts Supreme Judicial Court.[3] (Opp. at 9-11.) Respondent summarizes, for example, the following passage from Dr. Goldberg's GAL report, which piles conjecture upon conjecture:

> *If* the children develop a negative view of [their mother] or reject her beliefs they *may* suffer hostility and rejection from [their mother]. *If* this were to occur the children *may* resent [their father] for undermining their relationship with [their mother]. Thus, the children *would not* have good relationships with either parent.

(Opp. at 11 (emphasis supplied).) Incredibly, Respondent states that the findings of the GAL were "[b]ased on these *facts*." (*Id.* (emphasis supplied).) These are not facts at all, but mere speculation. Such conjecture does not constitute a clear, affirmative showing of actual harm "so substantial as to warrant a limitation on the [father's] religious freedom" (App. 8). *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972).

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[3] Respondent asserts, without factual support, that the guardian ad litem, Michael Goldberg, is "a well respected psychiatrist specifically experienced in the area of inter-religious conflict." This claim is not supported by the record.

II. THIS COURT MUST INDEPENDENTLY REVIEW THE FACTS ON APPEAL BECAUSE THIS CASE IMPLICATES PETITIONER'S FIRST AMENDMENT RIGHTS TO FREEDOM OF RELIGION.

A. Independent Appellate Review is the Proper Standard.

Respondent asserts that independent appellate review is required "only in cases implicating restrictions on the freedom of speech protected by the First Amendment. . . ." (Opp. at 15.) This is indeed such a case. As this Court has noted, religious worship and discussion are "forms of speech and association protected by the First Amendment." *Wallace v. Jaffree*, 472 U.S. 38, 50 n.35 (1985), *quoting Widmar v. Vincent*, 454 U.S. 263, 269 (1981).

Moreover, Respondent's suggestion that some constitutional rights are more deserving of protection than others is without legal foundation. This Court has applied searching appellate review to a broad range of cases implicating a wide range of constitutional rights, including: coerced confessions, double jeopardy, waiver of federal rights, probable cause determinations, Commerce Clause protections, and full faith and credit. (*See* Petition for Writ of Certiorari, at 9-10 (citing cases).) This Court also has cited with approval the Third Circuit's application of constitutional fact review in a case involving both the free speech and establishment clauses of the First Amendment. *See Bender v. Williamsport Area School District*, 475 U.S. 534, 540 n.3 (1986). The same standard should be applied to this case implicating First Amendment rights to freedom of religion.

B. Application of the Independent Review Standard Compels This Court to Reverse the Massachusetts Courts' Rulings.

The Massachusetts Supreme Judicial Court acknowledged that the facts of this case involve "mixed questions of fact and law" (App. 7). It noted that *"whether the harm found to exist amounts to the 'substantial harm' required to justify*

interference with the defendant's liberty interest is a close question" (App. 15) (emphasis supplied). In such circumstances, the relevant legal standard – harm to children "so substantial as to warrant a limitation on the defendant's religious freedom" (App. 8) and "clear evidence of substantial harm" (App. 9) – "can be given meaning only through its application to the particular circumstances of a case," and therefore independent fact review is required. *Miller v. Fenton*, 474 U.S. 104, 114-116 (1985).

Had the Supreme Judicial Court reviewed the record *independently* of the Probate Court's findings, as the Petitioner urged the court to do (App. 61-73), it would have ascertained that the only evidence of "harm" to the children, other than their distress over the parental conflict and divorce (App. 122-123), were two isolated incidents involving only the oldest child, Ari: (i) Jeffrey's passing threat to cut the fringes off his son's vest, or *tzitzit*, if Ari did not tuck them inside his pants (it is undisputed that Jeffrey immediately changed his mind and apologized to his son for the request), and (ii) Jeffrey's agreement, at Ari's request, to cut Ari's hair. (App. 35.) Based on these two isolated incidents, the Probate Court constitutionally could have fashioned a narrowly tailored order prohibiting Jeffrey from restricting Ari's wearing of *payes* (religiously significant sideburns) or *tzitzit*, or even from restricting the boy's observance of other Orthodox Jewish practices. Instead, the court sweepingly denied Jeffrey's religious and parental liberties. Had it applied independent appellate review, the Supreme Judicial Court would have seen that there was insufficient evidence of substantial harm to the children to justify the substantial curtailment of the father's First Amendment rights to freedom of speech, religion, and association. *Wisconsin v. Yoder*, 406 U.S. at 230; *Felton v. Felton*, 383 Mass. 232, 233 (1981).

C. This Court has Jurisdiction to Exercise Independent Appellate Review.

The Massachusetts Supreme Judicial Court heard this case on direct appellate review from the Probate Court. Petitioner thus questioned the Supreme Judicial Court's reliance on an improper standard of review at the first possible opportunity, that is, in his petition for rehearing.[4] (App. 61-73.) *See Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-78 (1930) ("The additional federal claim thus made was timely, since it was raised at the first opportunity."); *Herndon v. State of Georgia*, 295 U.S. 441, 444 (1935) (same).[5] The Supreme Judicial Court considered Petitioner's claim for independent appellate review – the only issue raised on review – and denied it. (App. 60.)[6] Because Petitioner squarely raised the issue of independent appellate review in a manner that was timely under both the Massachusetts procedural rules and Supreme Court precedent, this Court has jurisdiction to decide this issue.

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[4] The Massachusetts Rules of Appellate Procedure, unlike the Federal Rules of Appellate Procedure, do *not* require appellants to include a statement of the applicable standard of review.

[5] Respondent's reliance on *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987) is misplaced. The issue in *Rotary* was whether appellants had timely raised their argument that a statute was unconstitutionally vague and overbroad. That was a substantive argument that the petitioners were required to raise in the case in main. Here, in contrast, the issue is the proper standard of review by the Supreme Judicial Court, an issue which could only arise – and which Petitioner immediately addressed – *after* the Supreme Judicial Court issued its opinion.

[6] Respondent misstates Massachusetts Rule of Appellate Procedure 16, which does not automatically "deem waived" all legal issues not presented in a brief (Opp. at 13). Rather, Rule 16 provides that the "court need not" – but may – "pass upon questions or issues not argued in the brief." Mass. R. App. P. 16. Moreover, Massachusetts Rule of Appellate Procedure 27 expressly permits a litigant to raise "points of law or fact which it is contended the court has overlooked or misapprehended."

III. THE OPINION BELOW IS INCONSISTENT WITH RULINGS BY OTHER STATE COURTS OF LAST RESORT.

A. The Ruling Below Fails to Make a Finding of "Substantial Harm" Sufficient to Justify Restrictions on Petitioner's Constitutional Rights.

Although Respondent asserts that the decision of the Massachusetts Supreme Judicial Court is consistent with the decision of other state courts, her claim is contradicted by the very cases that she cites. In the vast majority of decisions noted in the Opposition, state courts held that a trial judge may *not* enjoin a parent from exposing his or her children to that parent's religious beliefs.[7] In the only two cases cited by

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[7] *See, e.g., Chandler v. Bishop*, 702 A.2d 813, 817 (N.H. 1997) (vacating religious restrictions on father's visitation rights); *Osteraas v. Osteraas*, 124 Idaho 350, 356 (1993) (reversing trial court decision to remove physical custody from mother based on her lack of religious affiliation); *Kirchner v. Caughey*, 606 A.2d 257, 260-261 (Md. 1992) (vacating order prohibiting father from having child participate in any church or church-related activity while in his custody); *Pater v. Pater*, 588 N.E.2d 794, 800 (Ohio 1992) (reversing judgment that subjected mother's visitation to restriction that mother not teach or expose child to her religion); *Felton v. Felton*, 383 Mass. at 234 (reversing trial court order forbidding visitation unless father refrained from instructing children in his religion); *Harris v. Harris*, 343 So.2d 762, 764 (Miss. 1977) (reversing restrictions on mother whose religious practices included snake-handling, so long as children were not exposed to physical danger); *In re Green*, 448 Pa. 338, 348-50 (1972) (reversing trial court because state does not have a sufficient interest outweighing parent's religious beliefs precluding medical treatment when child's life is not immediately imperiled); *Munoz v. Munoz*, 489 P.2d 1133, 1135 (Wash. 1971) (holding that courts should not disqualify any applicant from "visitation rights [or] from taking the children to a particular church, except where there is a clear and affirmative showing that the conflicting religious beliefs affect the general welfare of the child"); *Waites v. Waites*, 567 S.W.2d 326, 333 (Mo. 1978) (reversing custody award to father impermissibly based on fact that mother was a member of Jehovah's Witnesses religion); *Welker v. Welker*, 129 N.W.2d

Respondent in which courts upheld restrictions on religious practices, the courts found an affirmative and substantial showing of harm to the children *and* cited applicable state statutes giving the custodial parent the exclusive right to determine the religious upbringing of the child.[8] (Massachusetts has no such statute.) Nothing in the record of this case constitutes a "clear and affirmative" showing of harm to the Kendall children based on their exposure to Jeffrey's religious beliefs. The courts below adopted wholesale the legal recommendations of the guardian ad litem (a non-lawyer), which, in turn, were based primarily on the children's understandable distress over their parents' conflict and divorce – *not* on a finding of distress caused by exposure to the father's religious beliefs. (App. 122-123.)

The GAL's speculative projections of harm are inadequate to meet the constitutional requirement of substantial harm sufficient to warrant the limitations imposed on Jeffrey's constitutionally protected "liberty interest in educating his children in the tenets of his religion." (App. 7.) *See Wisconsin v. Yoder*, 406 U.S. at 230; *Felton*, 383 Mass. at 233; *Zummo v. Zummo*, 394 Pa. Super. Ct. 30, 47 (1990).

B. The Ruling Below Violates the Establishment Clause of the First Amendment.

Respondent contends that "the order also does not foster excessive government entanglement by simply allowing any

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134, 138-39 (Wis. 1964) (reversing custody award to father impermissibly based on mother's agnostic religious views).

[8] *LeDoux v. LeDoux*, 452 N.W.2d 1, 5 (Neb. 1990) (upholding religious restrictions based on a state statute giving custodial parent exclusive control over religious upbringing and on evidence that child wet himself, had nightmares, and complained about being with his father); *Funk v. Ossman*, 724 P.2d 1247, 1250 (Ariz. App. 1986) (upholding religious restrictions based on state statute giving custodial parent exclusive control over religious upbringing and on child's physical symptoms of anxiety, manifested by his soiling his pants (encopresis)).

judicial inquiry to center on the emotional harm to the children." (Opp. at 21.) Respondent is missing the constitutional point. The ruling below fosters excessive entanglement because it mandates that the children – initially raised in the Reform Jewish tradition and with continuing exposure to their father's Christian beliefs – must now be reared exclusively as Orthodox Jews with no exposure whatsoever to the central tenets of their father's religion. Excessive entanglement also arises because the Massachusetts courts required that a government-appointed guardian ad litem explain to the children that "they are being raised in the way they are [*i.e.*, in the Orthodox Jewish faith] *because the Court believes it is in their best interest.*" (App. 27-28 (emphasis supplied).) Finally, by requiring the continuous tape recording, monitoring, and judicial review of the spiritual teachings of the father's church, the courts below have further entangled government excessively with religion. Contrary to Respondent's assertion, such taping of religious meetings – particularly when combined with the near-complete prohibition on taking the children to church or Sunday school – is not "the least intrusive means of limiting the Petitioner's religious rights." (Opp. at 21.)

C. The Ruling Below Violates Petitioner's Right to Free Exercise of Religion Under the First Amendment.

Respondent contends that the Probate Court's orders were "narrowly tailored and do not unduly burden the Petitioner's right to practice his religion; rather, the orders only limit the Petitioner from exposing the children to aspects of his religion that were causing affirmative harm to the children." (Opp. at 12.) This reasoning defies both logic and the record below. Jeffrey cannot know, in advance, whether a given religious idea will cause the children worry or distress. By prohibiting Jeffrey from exposing his children to any religious belief that might cause the children "significant emotional distress or worry about their mother or about themselves" (App. 25-26), the order effectively prevents him from

sharing *any* religious teachings with his children. A far less burdensome order would have required interfaith family counseling to help the children maintain meaningful relationships with *both* parents while experiencing the religious differences as a source of strength instead of distress. Equally important, this Court's independent review of the record below would establish that the children did not suffer any "affirmative harm" warranting such severe infringement of the Petitioner's First Amendment Rights.

CONCLUSION

For the reasons stated above and in the Petition for a Writ of Certiorari, this Court should grant the Petition for a Writ of Certiorari.

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